TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 543

ISABELLA McMANUS, AS ADMINISTRATRIX OF TERENCE B. McMANUS, DECEASED, PLAINTIFF IN ERROR,

vs.

C. D. O'SULLIVAN, W. F. CASHMAN, JOHN HAYES, PETER DONOHUE, C. M. A. BUCKLEY, AND THE MINORS OF JOHN P. BUCKLEY, EDMUND J. BUCKLEY, VINCENT P. BUCKLEY, AND MARY C. BUCKLEY, BY C. M. A. BUCKLEY, THEIR GUARDIAN, CHARLES BAUMAN, GEORGE T. BOHEN, DAVID HUNTER, THOMAS MAGUIRE, AND JOHN DOE HAWKINS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED JULY 3, 1875.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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1 UNITED STATES OF AMERICA, *ss:*

To C. D. O'Sullivan, William F. Cashman, John Hayes, Peter Donohue, C. M. A. Buckley, and the minors John P. Buckley, Edmund J. Buckley, Vincent P. Buckley, and Mary C. Buckley, by C. M. A. Buckley, their general guardian, Charles Bauman, George T. Bohen, David Hunter, Thomas Maguire, and John Doe Hawkins, defendants in error, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States of America, to be held at the city of Washington, in the District of Columbia, on the second Monday of October, A. D. 1875, pursuant to a writ of error, filed in the clerk's office of the supreme court of the State of California, wherein Isabella McManus, as the administratrix of the estate of Terence B. McManus, deceased, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States of America, this 22nd day of December, A. D. 1874, and of the Independence of the United States the ninety-ninth.

[SEAL.] WM. T. WALLACE,
Chief-Justice of the Supreme Court of the State of California.

2 CITY & COUNTY OF SAN FRANCISCO,
State of California, ss:

Joseph H. Moore, being first duly sworn, says that he is a resident of said city & county, of lawful age; that on the 29th day of December, 1874, this affiant personally served the within citation upon Messrs. McCullough and Boyd, named as attorneys for certain defendants in the within action, by delivering to said Messrs. McCullough & Boyd, at their office in said city & county, personally, on said 29th day of December, 1874, a true copy of said citation, and at the same time showing them the original citation.

JOSEPH H. MOORE.

Signed & sworn to before me this 29th day of December, 1874.
[SEAL.] J. H. BLOOD,
Notary Public.

(Indorsed:) United States Supreme Court. Isabella McManus, admrx., &c., vs. C. D. O'Sullivan et al. Citation.
Due service admitted of the within citation, 29 Dec., 1874.
GRAY & HAVEN,
Attys. for all Defts. named in McCullough & Boyd's Answer.
SHARP & LLOYD,
Attys. for Defts. Donahue, John Hayes, Thomas McGuire, & John Doe Hawkins.

3 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the justices of the supreme court of the State of California, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the supreme court of said State, before

you, between Isabella McManus, as administratrix of the estate of Terence B. McManus, deceased, plaintiff in error, and C. D. O'Sullivan, William F. Cashman, John Hayes, Peter Donahue, C. M. A. Buckley, and the minors John P. Buckley, Edmund J. Buckley, Vincent P. Buckley, and Mary C. Buckley, by C. M. A. Buckley, their general guardian, Charles Bauman, George T. Bohen, David Hunter, Thomas Maguire, and John Doe Hawkins, defendants in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by her complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf; you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States of America, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the second Monday of October next, in the said United States Supreme Court, to be there and then held, that, the record and proceedings aforesaid be inspected, the said United States Supreme Court may cause further to be done therein to correct that error what of right and according to law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this 22nd day of December, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the United States the ninety-ninth.

[SEAL.] L. S. B. SAWYER,
Clerk U. S. Circuit Court, &c.

The above writ of error is hereby allowed.

WM. T. WALLACE,
Chief-Justice of the Supreme Court of the State of California.

(Indorsed:) United States Supreme Court. Isabella McManus admrx., vs. C. D. O'Sullivan et al. Writ of error. Filed December 28th, 1874. Grant I. Taggart, clerk.

4 In the Supreme Court of the United States of America.

ISABELLA MCMANUS, ADMINISTRATRIX OF the estate of Terence B. McManus, deceased,
vs.
C. D. O'SULLIVAN ET AL.

Know all men by these presents that we, Elliott J. Moore and John M. Moore, of the city and county of San Francisco, in the State of California, are held and firmly bound unto C. D. O'Sullivan, William F. Cashman, John Hayes, Peter Donahue, C. M. A. Buckley, the minors John P. Buckley, Edmund J. Buckley, Vincent P. Buckley, and Mary C. Buckley, Charles Bauman, George T. Bohen, David Hunter, Thomas Maguire, and John Doe Hawkins, in the sum of two hundred and fifty dollars, ($250.00,) to be paid to the said C. D. O'Sullivan, William F.
5 Cashman, John Hayes, Peter Donahue, C. M. A. Buckley, the minors John P. Buckley, Edmund J. Buckley, Vincent P. Buckley, and Mary C. Buckley, Charles Bauman, George T. Bohen, David Hunter, Thomas Maguire, and John Doe Hawkins, their execu-

tors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents, sealed with our seals, dated this 22nd day of December, A. D. 1874.

Whereas the above-named Isabella McManus, administratrix of the estate of Terence B. McManus, deceased, has prosecuted a writ of error to the Supreme Court of the United States of America, to reverse the judgment rendered in the above-entitled action by the supreme court of the State of California:

Now, therefore, the condition of this obligation is such, that if the above-named Isabella McManus shall prosecute her said writ of error to effect, and answer all costs if she shall make good her plea,
6 then this obligation shall bevoid; otherwise to remain in full force and virtue.

E. J. MOORE.
JNO. M. MOORE.

Acknowledged, signed, sealed, and delivered in presence of—

UNITED STATES OF AMERICA,
State of California, City and County of San Francisco, ss:

Elliott J. Moore and John M. Moore, being duly sworn, each for himself deposes and says that he is a freeholder in said State, and is worth the sum of two hundred and fifty ($250) dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

E. J. MOORE.
JNO. M. MOORE.

Subscribed and sworn to before me this 22d day of December, 1874.
[SEAL.] J. H. BLOOD,
Notary Public.

7 The amount of the bond in the within-entitled action on appeal is fixed at $250, and the within bond is hereby approved.

WM. T. WALLACE,
Chief-Justice.

(Indorsed:) Isabella McManus vs. C. D. O'Sullivan. Bond. Filed December 28th, 1874. Grant I. Taggart, clerk.

8 2340.

In the supreme court of the State of California.

ISABELLA MCMANUS, AS ADMINISTRATRIX, ETC., plaintiff and appellant,
vs.
C. D. O'SULLIVAN, PETER DONAHUE, ET AL., defendants and respondents.

TRANSCRIPT ON APPEAL.

S. Heydenfeldt and Joseph H. Moore, attorneys for appellant; Calhoun Benham and Alexander Campbell, of counsel.

McCullough & Boyd, and Sharp & Lyod, attorneys for respondents; Gray and Haven, of counsel.

9 In the supreme court of the State of California.

Transcript on appeal.

In the district court of the fourth judicial district in and for the city and county of San Francisco.

ISABELLA MCMANUS, AS ADMINISTRATRIX OF the estate of Terence B. McManus, deceased, plaintiff,

vs.

C. D. O'SULLIVAN, WILLIAM F. CASHMAN, John Hayes, Peter Donahue, Patrick Kelly, C. M. A. Buckley, Mary E. Buckley, John Doe Hawkins, Thomas McGuire, John Doe, Richard Roe, John Brown, et al., defendants.

Complaint in ejectment.

The above-named plaintiff, as administratrix of the estate of F.
10 B. McManus, deceased, complains of the defendants herein, (the real names of the seventeen defendants, last above named, not being known to plaintiff, she prays leave to insert them when known,) and, for cause of action, alleges as follows:

Plaintiff alleges, on her information and belief, that on the 14th day of July, A. D. 1853, said F. B. McManus was seized in fee and possessed of all that piece or parcel of land situate in said city and county, and bounded and described as follows, to wit: Commencing at a point near one of the lines, to wit, the westerly line of Samuel Fleishaker's land, the same being now or formerly owned by said Fleishaker, or known as said Fleishaker's land; thence running north 15¼ deg. west 41.06 chains to the northwest corner of said Fleishaker's land; thence north 40 deg. east 17.76 chains, in the direction of Sugar-loaf or Lone Mountain; thence north 41½ deg. east 23.20 chains, to a point on a line of fence, now or formerly known as Williams' fence; thence south 75¼ deg. west 39.94 chains, and connecting with a corner of land, now or formerly owned by said Williams, at 14.94 chains; thence south 1 deg. east 54.04 chains; thence south 76½ deg. east 25 chains to the place of commencement, containing by estimation 130 acres and 30
11 perches, the same having been formerly surveyed by C. Cox, deputy county surveyor, July 14th, 1853, and the survey thereof filed, at the date last named, in the county surveyor's office of San Francisco County, and numbered survey No. 1641.

And the plaintiff further alleges, on information and belief, that said McManus continued to be seized in fee and possessed of said land, and remained in the actual and exclusive possession, use, and occupation thereof from said July 14th, 1853, until and at the time of his decease, hereinafter mentioned, and that said premises are a part of the estate of said decedent.

That on the 15th day of January, A. D. 1861, said T. B. McManus was a resident of the city and county of San Francisco, State of California, and at the time and place last above named, departed this life intestate, leaving estate in said city and county.

That afterwards, to wit, on the 8th day of August, A. D. 1864, by order of the probate court in and for said city and county, on that day duly made, it was by said court ordered that letters of administration

on the estate of said intestate therein to be issued to John W.
12 Brumagim, esq., as administrator of the estate of F. B. McManus, deceased, and he thereupon, on said day last named, duly qualified as said administrator, and letters of administration were accordingly issued to him as such administrator.

That afterwards, to wit, on or about the 9th day of August, A. D. 1864, said defendants, as this plaintiff is informed and believes, and so charges, wrongfully and unlawfully entered into said premises with the appurtenances, and ousted said administrator from the possession and occupation thereof; and said defendants did thereafter, during all the time hereinafter specified, and so long as said administrator continued to hold said trust, to wit, until the 6th day of May, A. D. 1867, unlawfully and wrongfully keep him so expelled, put out, and removed.

That after the date aforesaid of the appointment of said John W. Brumagim, esq., as administrator, he resigned said trust; and after said resignation, to wit, on the 1st day of May, A. D. 1867, this plaintiff signed and filed her written petition with the clerk of said probate court, praying that letters of administration be issued to her on the said
13 estate, and subsequent thereto, to wit, on the 6th day of May, A. D. 1867, by order of said probate court of said city and county, on that day duly made, the resignation of said administrator was accepted, and his said letters were vacated; and afterwards, to wit, on the 6th day of June, A. D. 1867, it was ordered by said court that letters of administration upon said estate be issued to this plaintiff, and the plaintiff then and there duly qualified as said administratrix, and letters of administration were accordingly duly issued to her as such administratrix, and that said letters are still unrevoked and in full force, and that the plaintiff since said day last named has ever been and still is such administratrix.

That, at the time of the issuance of said letters, and by virtue thereof, she became, has ever since been, and still is, as such administratrix, entitled to the possession and enjoyment of said real estate, to entry thereon, and to the rents issued and profits thereof accruing since
14 the appointment of said John W. Brumagim, as aforesaid, and to the damages since said time sustained by said unlawfull ejectment and detention by said defendants.

That said defendants do still unlawfully and wrongfully withhold from the plaintiff, as said administratrix, the possession and enjoyment of said premises, and the rents, issues, and profits thereof.

That the value of the use and occupation of said premises since said 9th day of August, 1864, is at the rate of one thousand dollars per annum.

That said plaintiff, as said administratrix, by said unlawful and wrongful ejectment and detention by said defendants of said lands and premises, has sustained damages to the amount of one thousand dollars.

Whereupon the plaintiff prays the judgment of this court that the said defendants do forthwith deliver up to the plaintiff the possession of said premises heretofore described, and every part thereof, and pay to the plaintiff the sum of four thousand dollars for the damages sustained by the plaintiff by reason of the defendants withholding
15 possession of said premises, and for the use and occupation thereof, and for her costs in this action expended.

EUGENE CASSERLY AND
JOSEPH H. MOORE,
Attorneys for Plaintiff.

AUGUST 13TH, 1867.
Complaint duly verified.

(Endorsed:) Filed August 17th, 1867. Wm. Loewy, clerk. Jas. E. Ashcorn, deputy clerk.

Summons in the usual form.

Answer.

Title of court and cause.

Now come the defendants, C. D. Sullivan, Wm. F. Cashman, C. M. A. Buckley, for herself; and the minors John P. Buckley, Edmund J. Buckley, Vincent P. Buckley, and Mary C. Buckley, by C. M. A. Buckley, their general guardian; Chas. Bauman, impleaded herein as John Doe; and George T. Bohen, impleaded herein as Richard Roe; and David Hunter, impleaded herein as John Brown, by McCullough and Boyd, their attorneys, and for their separate answer to the complaint of said plaintiff herein jointly and severally—

16 1. Deny on their information and belief that on the 14th day of July, A. D. 1853, or at any time before or since, said F. B. McManus was seized, in fee or otherwise, or possessed of, or entitled to the possession of, the following described portion of the tract of land set forth and described in the said complaint, to wit: Beginning at the northwesterly corner of the Fleishaker tract, in the northwest quarter of section 7, township 2 south, range 5 west; thence north 40 deg. east 17.76 chains; thence north 41 deg. 30 min. east 10.90 chains, to fence of Odd-Fellows' Cemetery; thence north 48 deg. forty-five min. west 8.14 chains along said fence, to a point therein; thence south 75 deg. 15 min. west 2,165 chains, more or less, to a point in the westerly fence of Sullivan, Buckley & Cashman; thence south 38 deg. 45 min. east, along said fence, 7.42 chains, to corner of fence; thence south 88 deg. 30 min. west, 765 chains, more or less, to a point; thence south 1 deg. east, 18.97 chains, more or less, to Donahue's northerly fence; thence north 88 deg. 45 min. east 11.09 chains, more or less, to corner; thence north 89 deg. 15. min. east 0.72 chains, to a point; thence north

17 15 deg. 15 min. west 3.30 chains, to the place of beginning; containing $52\frac{11}{100}$ acres, and being part of the Sullivan, Buckley & Cashman tract. Also, commencing at a point which is described in plaintiff's complaint as a corner of land now or formerly owned by said Williams, and from thence running north 48 deg. 30 min. west 3.50–100 chains; thence south 41½ west 10.90–100 chains; thence south 40 deg. west 17.76–100 chains; thence south 15¼ deg. east 3.60–100 chains; thence north 89 deg. east 12 chains; thence north 40 deg. east 11.80–100 chains; thence north 41½ deg. east 5.20–100 chains; thence north 2 deg. 15 min. west 2.80–100 chains; thence north 1 deg. west 3.75–100 chains; thence north 36 deg. 30 min. west 3.90–100 chains, to the place of beginning; containing about $34\frac{5}{10}$ acres.

Defendants deny, on information and belief, that said McManus continued seized, in fee or otherwise, or at all, or possessed of the above-described lands and premises, or any part thereof, or was or remained in the actual or exclusive possession, or otherwise, or use or occu-

18 pation of said above-described lands, or any part thereof, from July 14, 1853, until or at the time of his decease, or for any length of time whatever.

Deny that said above-described lands, or any part thereof, is or was ever a part of the estate of said McManus.

Deny that on the 9th day of August, 1864, or at any other time, these

defendants, or either of them, wrongfully or unlawfully entered into said above-described premises, or the appurtenances, or ousted John W. Brumagim, the then administrator of the estate of F. B. McManus, as alleged in the complaint, from the possession or occupation of said premises, or any part thereof; deny that said defendants, or either of them, did then or thereafter, or for any length of time whatever, or so long as said Brumagim continued or claimed to be the administrator of the alleged estate of said McManus, or until May 6th, 1867, or at any other time, unlawfully or wrongfully keep said alleged administrator, Brumagim, expelled or put out, or amoved therefrom.

Defendants deny that on the 6th of May, 1867, or the 6th day of June, 1867, or any other day, or at the time of the alleged issuance of
19 letters of administration to the plaintiff, Isabella McManus, or at any time, or by virtue of such alleged letters, or at all, she became, or has ever been, or ever was or is now, as administratrix or otherwise, entitled to the possession or enjoyment of said above-described real estate, or to entry thereon, or to the rents or issues or profits accruing since the alleged appointment of said Brumagim as administrator, or for any length of time whatever, from said premises; deny that said defendants, or either of them, unlawfully or wrongfully ejected the plaintiff or said Brumagim or McManus, from said premises or any part thereof, or ever, or do now, unlawfully or wrongfully detained or detain the same from said plaintiff or Brumagim or McManus, or that the said defendants, or either of them, do now or did ever unlawfully or wrongfully withhold from plaintiff, as such alleged administratrix or otherwise, the possession or enjoyment of said premises, or any part thereof, or the rents or issues or profits thereof.

Deny that the value of the use and occupation of said above-described premises since August 9th, 1864, is at the rate of $1,000 per
20 annum, and aver such value not to exceed $50 per annum.

Deny that plaintiff, as such alleged administratrix or otherwise, by any unlawfull or wrongfull ejectment or detention by these defendants, or either of them, of the above-described lands, or any part thereof, has sustained damages to the amount of $1,000, or in any amount whatever.

And as to the alleged appointment of said Brumagim as administrator, or said plaintiff as administratrix, as averred in the complaint and the proceedings touching the same, these defendants, not having sufficient knowledge or information thereof, deny the same, and ask that plaintiff may be required to prove the same.

And, for a further and separate answer, the said defendants allege and aver that C. D. O'Sullivan, W. F. Cashman, C. M. A. Buckley, and C. M. A. Buckley, general guardian of the minors John P. Buckley, Edmund J. Buckley, Vincent P. Buckley, and Mary C. Buckley, are now, and were at the time of the commencement of this action, the lawfull
21 owners, in fee-simple, of the lands and premises above described, being a portion of the lands described in said complaint, and that they now, and were at the commencement of this action, in the lawful possession thereof; and that the defendants C. Bauman, G. T. Bohen, and David Hunter, are the tenants of the last-named defendants.

3. And for a further and separate answer and defense, these defendants say and allege that said plaintiff ought not to have or maintain said action, because they aver, and the fact is, that the defendants first specially named in the last answer and plea, and those under whom they claim, are now, and were at the time of the commencement of this action, in the possession and occupation of the premises hereinabove

particularly described, and were, on the 8th day of March, A. D. 1866, and for more than five years prior thereto, and have continuously since been, in the actual bona-fide possession, by themselves and their tenants, of said premises, and every part thereof, and that they, previous to the 1st day of April, 1868, did pay all taxes which had been assessed on said described premises during the five fiscal years preceding the year beginning July 1, 1866.

22 4. And for a further and separate answer and defense to said action, the said defendants say and aver that said plaintiff ought not to have or maintain her said action, because said defendants say and aver that said plaintiff or said Brumagim, or said McManus, or either of them, or the ancestor or predecessor or grantor of them, or either of them, was not seized or possessed of the premises hereinabove described, or any part thereof, being a portion of the premises in the complaint described, within five years next before the commencement of this action, nor within fifteen years next before the commencement of this action, nor within five years and six months next before the commencement of this action, nor within six months next after the decease of said McManus, nor within six months next after the alleged appointment of said Brumagim as administrator, nor within six months next after the alleged appointment of said plaintiff as administratrix; and the said defendants set up and reply upon the statu'es in such case made and provided in bar of said action.

23 5. And for a further and separate answer and defense, these defendants allege and say that said plaintiff ought not to have or maintain her said action, because they say and aver that the defendants first specially named in the second answer or plea above, and those under whom they claim, entered into the possession of the premises hereinabove described, (being a portion of the premis' described in the complaint,) under claim of title, exclusive of any other right, founding such claim upon a written instrument as being a conveyance of said premises hereinabove described; and the said defendants, and those under whom they claim, have been in the actual, lawful, peaceable, quiet, open, notorious, exclusive, and continued occupation and possession of the above-described premises, and every part thereof, as the owners thereof, under such claim, for five years next before the commenc'ment of this action, and for fifteen years next before the commenc'ment of this action, claiming, holding, and occupying the same adversely to said McManus, and to said Brumagim and to the plaintiff, and to each of them, and to their and each of their pre-

24 decessors, and to all other persons whomsoever, and to all the world.

6. And for a further and separate answer and defense to said complaint and action, these defendants say and aver that the title to the premises hereinbefore described, being a portion of the premises described in the complaint, if not in the defendants first specially named in the above second answer and plea, is outstanding in some person or persons other than said plaintiff, whose name' are unknown to these defendants.

7. And for a further and separate defense and answer, the said defendants allege and aver that the said plaintiff ought not further to have or maintain here said action, because they say and aver that since the commencement of this action, and, viz, on the 28 day of March, 1868, and before this day, the defendant's first specially in the said second answer mentioned, became, and have since been, and are now, the lawful owners in fee-simple of the lands and premises above described.

being a portion of the lands described in said complaint, and that they are in the lawful possession thereof.

25 8. And for a further and separate answer and defense, these defendants say and allege that said plaintiff ought not to have or maintain her action against these defendants, because they say that the Congress of the United States did, on the 8th day of March, A. D. 1866, pass an act entitled "An act to quiet the title to certain lands within the corporate limits of the city of San Francisco," which act was approved on the 8th day of March, 1866, and the board of supervisors of the city and county of San Francisco did pass an order or ordinance numbered eight hundred, which said order was approved by the mayor and president of the board of supervisors on January 14th, 1868, and which is entitled an order for the settlement and quieting titles to land in the city and county of San Francisco, situate above high-water mark of the bay of San Francisco and the Pacific Ocean, and without the corporate limits of the city of San Francisco," and the legislature of the State of California did, on the 28th day of March, A. D. 1868, pass an act entitled "An act to confirm a certain order passed by the

26 board of supervisors of the city and county of San Francisco," which act was approved on said last-mentioned day, and which act ratifies and confirms said order No. 800, and all proceedings theretofore had, and which had then taken place, and all proceedings that should or shall thereafter or hereafter take place under the provisions of said order, were and are ratified and confirmed in all respects.

And these defendants, further allege and aver that the defendants first specially named in said second answer are now, and were at the time of the commencement of this action, in the bona-fide actual possession and occupation of the premises hereinbefore, viz, in the first answer hereto, particularly described, and were on the 8th day of March, 1866, and for more than five years prior thereto, and have continuously since been, and are now, in the actual bona-fide actual possession, by themselves and their tenants, of said premises and every part thereof, and that they did, previous to the 1st day of April, A. D. 1868, pay all taxes which had been assessed on said lands and premises during

27 the five fiscal years preceeding the year beginning July 1st, 1866, that the lands above described and in controversy in this action; come within the class of lands, and are a part of those lands, designated in said order, and the said act of the legislature, and the said act of Congress, and the decree of the circuit court of the United States for the northern district of California, entered on the 18th day of May, 1865; that they are now, and were at the commencement of this action, and have been for more than five years last past, situate within the corporate limits of the city and county of San Francisco; that they were situate above the natural ordinary high-water mark of the Bay of San Francisco and the Pacific Ocean, as the same existed on the 7th day of July, A. D. 1846, and without the corporate limits of the city of San Francisco, as defined in the act to re-incorporate the said city, passed by the legislature of California on the 15th day of April, 1851; that the said board of supervisors did devise and adopt a plan for the subdivision into blocks and lots of all the lands (embracing the lands in controversy herein) in said ordinance included, as therein provided in all respects, and

28 immediately after the passage of said order; that thereafter the said board did cause to be made a map of said lands included in said order, as in all respects therein provided; that the said map is not yet completed, nor has the same been deposited as yet in the office of the clerk of the board of supervisors, as provided in section 3 of said

ordinance; that these defendants, in compliance with the provisions of section 4 and the other sections of said ordinance, have presented their claim to said lands, with a description and diagram thereof, to the committee of said board on outside lands, and have had the same delineated on said map, and the same now appears thereon.

And the said defendants aver their intention and determination, and their readiness and willingness, to comply with and to do and perform each and every act, and to make any and all payments to be made by them, or upon their part complied with, done, performed, or made under and by the terms of said order or ordinance, or said act of the legislature, or act of Congress, whenever and as fast as the terms thereof
29 and the proceedings to be taken or had thereunder will permit the same to be done, performed, or made. They allege and aver that by their acts they have heretofore availed themselves, and they aver that it is their intent and determination now and hereafter to continue to avail themselves, of the rights and benefits conferred by said order, the said act of the legislature, and act of Congress; wherefore said defendants say that they are entitled to all the rights, privileges, benefits, and advantages conferred by said order, or said act of the legislature, or act of Congress; that they are entitled to be, and have become, the owners in fee-simple of all the right, title, or claim which the said city and county ever had or may hereafter acquire as the successor of the pueblo of San Francisco, or as the grantee or patentee of the United States, in and to the lands above particularly described and in controversy in this case, and that they have become and are the owners in fee-simple of said lands.

Wherefore, these defendants pray judgment against plaintiff for their costs, etc., and for general relief.

McCULLOUGH AND BOYD,
30 *Attorneys for the said Answering Defendants.*

Answer duly verified.

Answer of Peter Donahue, (sued as Richard Roe,) John Hays, Thomas Maguire, and John Doe Hawkins, defendants.

The answer of said defendants was identical with the answer last above in respect to the pleadings; and the description of the land claimed by such defendants is as follows: Commencing at a point north 7 chains 76 links, and west 9 chains 33 links, from the southwest corner of section 7, township 2 south, range 5 west; thence north 89 deg. 45 min. east 37 chains 56 links; thence north 81 deg. 45 min. east 22 chains 41 links; thence north 35 deg. west 8 chains 93 links; thence north 32 deg. 45 min. west 22 chains 92 links; thence south 82 deg. 45 min. west 3 chains 58 links; thence north 89 deg. 15 min. west 8 chains; thence south 89 deg. west 13 chains 38 links; thence south 88 deg. 45 min. west 13 chains 94 links; thence south 77 deg. 30 min. west 3 chains 35 links; thence south 11 deg. 45 min. west 8 chains 14 links; thence south 5 deg. 30 min. east 4 chains 81 links; thence south 4 deg. 45 min.
31 east 8 chains 11 links; thence south 3 deg. east 7 chains 89 links, to the place of commencement.

SHARP & LLOYD,
Attorneys for Defendants.

Settled statement on appeal.

[Title of court and cause.]

The above-named cause came on regularly for trial before a jury on the 10th day of August, A. D. 1869, when the following testimony was introduced on the part of the plaintiff:

M. S. COOK, a witness for plaintiff, being first duly sworn, testified:

I have lived near Lone Mountain and the premises in dispute since the latter part of November, 1853, and live there now. In September, 1858, I removed to the county of Alameda, and remained a resident of that county until September, 1860, but visited this city occasionally. I know the land in question, and knew T. B. McManus in his lifetime, and first knew of his claiming said land in the year 1854. Previous to July or August, 1854, he had a canvass tent upon the land, and at that date he erected a small cabin, built with boards, near where there was a well, and at the west side of the ranch, in a small valley. He,
32 with his hired man, cut wood and burned charcoal on the land, and sold the wood and coal in the city, and had a small piece of land to the extent of half an acre fenced around his house, which was cultivated as a flower-garden, and during one or more years had vegetables cultivated therein. The house was ten or twelve by fourteen or eighteen feet in size, having a double-pitch shingle roof, and one door and one window.

When I returned to this city in September, 1860, I saw McManus on *on* the land at his house, and that was the last I remember of seeing Mr. McManus. He died on the 15th day of January, A. D. 1861. I recollect his funeral.

In September or October, 1854, I don't remember which, he commenced to run his fence along the southeast line of his ranch, between the McManus and Crochet rancho, commencing at Williams' land. The fence there was two by three-inch rails, eighteen or twenty feet long. He pointed his posts and drove them down with a mallet, and nailed one rail on top and the other about the center, and then putting brush underneath until he came to there, (showing a point on the map,
33 Exhibit 1,) and he then ran a brush fence and continued it all the way to a point near John Kelly's, as marked on Exhibit 1. This latter fence was all brush. This work was not all done in the year 1854, but in 1855 he continued keeping the fence along occasionally that way, until he got the land enclosed as shown on Exhibit 1. The west line of fence was near the great sand-bank, and was a two-board fence. He put it up in the year 1856. The fences of McManus did not cross the central macadamized road on the south; on the south line, along the said central road, there was a brush fence without any rail on the top. This brush fence was a good fence when it was built, and would turn cattle; but of course it withered down like all other kinds of brush fence, after awhile, so they would break through. The north fence was made of posts driven down and brush interwoven between the posts. In the year 1856 the fence was completed around the entire tract, as shown by the dotted line on Exhibit No. 1. I have seen a man named Sheridan repairing the fences sometimes, and while I lived near, and
34 until I went to Alameda, in 1858, the fences were in good order. But on my return, in 1860, some of the fences were broken down. The last time I saw the McManus house was in the forepart of December, 1860, and the last time I saw T. B. McManus was in September,

1860, at his house on the ranch, and the house disappeared from the land in January, A. D. 1861.

In April or May, 1861, I was cutting wood on the land in question, when John P. Buckley came there and asked me what I was doing, and I told him I was cutting wood. He asked me if I knew whose land I was on. I told him I did; that it belonged to McManus. He replied, "I have taken up that ranch." I stopped cutting wood, and went home, and he soon stopped at my house and said he did not want to prosecute me for that, but if I should go there any more he would do so.

ISABELLA MCMANUS, the plaintiff, called for the plaintiff, and testified:

Terence B. McManus, now deceased, was my brother. At my
35 request Mr. Peter Donahue, one of the defendants, met me in 1866, at the store of Mr. P. McAran, in this city, and I told him in the presence of P. McAran, "I have come to this country, took look after my brother's land, and I had understood that he was one of the parties that had taken it up." He replied, "Miss Manus, I had no idea of taking up your brother's land, until John Peter Buckley called on me one Sunday evening, and asked me why would I not go and take up some of McManus' land; there was no one for it. I have got some of the land; I don't know how much; but when you prove your title I will give you the land, or what is equivalent to it." I am the only heir of my brother, but there are other parties interested with me, to whom I had to give some of the land, in order to bring this suit to my lawyers, and to Judge Heydenfeldt. I get only one-half of the land recovered.

WM. P. HUMPHREYS, being duly sworn, testified for plaintiff as follows:

I am city and county surveyor. I was city and county surveyor in July, 1853. A survey of the McManus tract was made at the latter date by one of my deputies, Clement Cox. It is survey No. 1641.
36 I caused a resurvey to be made in A. D. 1867. That resurvey is in my hands.

(Said survey was put in evidence, and marked "Plaintiff's Exhibit No. one.")

The black lines indicate the survey of the McMan's tract. The survey made in 1853, and the resurvey made in 1867, are identical, as nearly as instruments can make two surveys.

P. MCARAN, witness, called for the plaintiff, testified as follows:

I have lived in this city 17 years, and I knew Terence B. McManus in his life-time, from 1852 up to time of his death.

(Witness was shown Exh. B, when witness said:)

That is a copy of a paper which was left in the papers belonging to a friend of mine by the name of W. D. McGarraghan, to whom I succeeded in business. I visited the land in controversy several times in the spring of 1854, with Mr. McGarraghan, to make arrangements to fence the land, and I also visited the land about one year and a half ago, and after this suit was commenced. I recollect an interview
37 at my office, brought about by myself, between Miss McManus and Mr. Donahue, one of the defendants, and before this suit was commenced. This interview was for the purpose of making some compromise for the interest Donahue had in the land. Donahue said he did not know how much he had of the land, or if he had any; and if he

had any of the land claimed by McManus, he would give it to her when she proved her claim. John P. Buckley's name was mentioned, but he was not present.)

(Here insert Exhibit No. one.)

ROBERT SHERIDAN, being first duly sworn, testified for plaintiff:

I knew Terence B. McManus for several years before his death, and until he died. He employed me to have his fences seen to and kept up for several years, immediately before and up to the time of his death. He allowed me also to cut wood and burn charcoal on his tract.

I knew his tract—the land sued for in this action. I kept his fences in good order and repair during the time he employed me.

38 I also was accustomed, for several years before his death, by his permission, to cut wood and burn charcoal from his place and send them to San Francisco for sale in the market.

John W. Williams was next north of him; on one side of him, to the east, was Crochet. McManus had his residence in a little cove or valley west and south from Lone Mountain; he had a well near his house, also a small garden. His land was fenced; the fences was brush and timber, and the brush fence was brush shrubbery and trees cut down and put into it for fencing—a perfectly good. I kept it in order; I was constantly repairing the fences when needed, and kept them up from the cattle going through, and the board fences likewise. After the death of McManus the fences were almost all torn down except one old fence on Williams' line, which is still there. I usually repaired the fences with brush and sometimes old boards.

That three-rail fence was between McCormack and Kelly, and another one was between Williams' and what was McManus'; that between McCormack's line and Kelly's line was along the sand band—

39 wooden fence. McManus kept a horse on his place. During all the time I knew him he resided on his tract. I knew John P. Buckley, now deceased. After McManus died he took possession of the ranch, and after the flood of the Sacramento River, and in August, 1861, I had a conversation with said John P. Buckley, while Mr. Buckley had a party, of whom I was one, surveying the land, including a part of the land formerly claimed by McManus. Mr. Buckley said there was a piece of McManus' land he took in, and there was no owner for it. He told me I could have (meaning rent) the place he had just built, and the repairing of the house, and I could have it until there should come some one for it. He said he had part of it, and I could have it (meaning rent it) until some person should come, and he would deliver it.

Plaintiff next put in evidence the records of the probate proceedings in the probate court of the city and county of San Francisco, in the matter of the estate of Terence B. McManus, deceased, wherein and whereby it was shown that T. B. McManus died on the 15th day of January, A. D. 1851; that John W. Brumagim was appointed as administrator on the 5th day of August, A. D. 1864; and that said Bru-

40 magim resigned on the 1st day of May, 1867, which resignation was accepted on the 6th day of May, 1867, and the plaintiff appointed special administratrix on the same day; and on the 6th day of June, 1867, the present plaintiff was appointed general administratrix of the estate of said deceased.

It was admitted that the lands sued for lie within the description of the lands embraced in the judicial decree in the cause, United States

vs. The City of San Francisco, entered May 18th, A. D. 1865, in the United States circuit court in and for this district of California; also within the area described in the order, No. 800, of the board of supervisors of the city and county of San Francisco, passed A. D. 1868; and of the act of the legislature of the State of California, entitled "An act to confirm a certain order passed by the supervisors of the city and county of San Francisco," approved March 27th, 1868; and of the act of Congress of the 8th day of March, A. D. 1866, entitled "An act to quiet the title to certain lands within the corporate limits of the city of San Francisco," approved March 8th, 1866.

It was also admitted that the several defendants were, at the date of suit commenced, in possession of the parcels of land by them re-
41 spectively claimed in their answers, and that they each lie within the tract sued for.

Here plaintiff rested.

Motion for a nonsuit.

The counsel for defendants then moved for a nonsuit upon the following grounds, to wit:

1st. That the evidence does not show or tend to show that the plaintiff, or any one under whom she claims, was seized or possessed of the demanded premises, or any part thereof, at the time the defendants entered and became possessed thereof, nor at any time since.

2nd. That the evidence does show that the defendants, their ancestors, predecessors, and grantors, were seized and possessed of the premises, and every part thereof, adversely to the plaintiff and those under whom she claims, for more than five years next before the commencement of this action.

3rd. That the evidence does not show or tend to show that the plaintiff, or her ancestors, predecessors, or grantors, or either of them, were seized or possessed of the premises, or any part thereof, at any time within five years next before the commencement of this action, or at any time since.

42 4th. That it appears from the evidence in this case that the legal title was in the pueblo; that McManus has never connected himself with the legal title, and, therefore, occupies the position of trespasser, so far as possession is concerned, and the presumption is that defendants are in possession under the pueblo title by permission of the city and county of San Francisco.

5. The plaintiff had no capacity to institute this action.

Which motion for a nonsuit was then and there denied by the court.

The judge then announced that said motion for non-suit would have been granted had proof been made by plaintiff of clear adverse possession by defendants of the land claimed by plaintiff taken more than five years before suit commenced, and that defendants had held such continued adverse possession ever since; and, also, that should defendants hereafter on the trial introduce such proof, he would thereupon instruct the jury to find for the defendants.

Here plaintiff admitted that defendants would introduce such proofs, and also would produce witness to prove that such possession of defendants was taken January 1st, 1862, under claim of title adverse to
43 the plaintiff, but not to the city of San Francisco.

Whereupon the plaintiff by her counsel in open court admitted for the purpose of this matter that the defendants were in the actual, open, exclusive, and notorious possession of the land in controversy for

more than five years prior to the commencement of this suit, and on and ever since the first day of January, A. D. 1862, and had held the same from that date adversely to the plaintiff, her ancestors, predecessors, and grantors, and to the estate of T. B. McManus, deceased, but not to the city and county of San Francisco.

Whereupon the counsel for the defendants again renewed their motion upon the grounds above stated.

The court thereupon directed the jury to render a verdict for the defendants, which the jury under said direction did accordingly, and judgment was entered in con*f*irmity therewith.

To which action, ruling, and direction of the court, and to each thereof, and to the said judgment the plaintiff then and there *a*ccepted.

The above was all the testimony introduced or offered upon the trial of said cause.

Specification of plaintiff's grounds of appeal.

44 Plaintiff, in support of her appeal herein, assigns and will rely upon the following grounds: That errors of law occurred at the trial which were *a*ccepted to by plaintiff, and specifies the following as the errors on which she intends to rely:

1st. The court erred in instructing the jury to the effect that the defendants were entitled to a verdict in their favor; and, also in instructing the jury that defendants were so entitled by reason of the fact, and of plaintiff's admission thereof, that defendants were in possession of the disputed tract adversely to plaintiff during five years next preceding action brought.

2nd. The court erred in not submitting to the jury for their determination the question whether or not the possession of defendants by themselves or tenants, on the 8th day of March, 1866, of said tract was an actual bona-fide possession.

3rd. The court erred in not instructing the jury that it was one of the conditions essential to entitle the defendants to a verdict that their possession on the day and in the manner last above mentioned should have been actual and bona-fide.

4th. The court erred in instructing the jury to find for the defendants.

45 5th. The court erred in ordering a judgment for defendants.

Upon the foregoing statement and grounds the plaintiff proposes to appeal from the decision, verdict, and judgment heretofore rendered and entered in said action.

The above and foregoing statement for appeal having been settled by me I certify that the same has been allowed and is correct.

November 17th, 1869.

E. D. SAWYER,
District Judge.

Judgment.

[Title of court and cause.]

This cause came on regularly for trial, Messers. Moore, Benham, and A. Campbell for the plaintiff, and Messers. S. A. Sharp, McCullough, Gray, and Myrick for defendants. A jury of twelve persons was regularly empanelled and sworn to try said cause. Witness' on the part of the plaintiff and defendants were sworn and examined; whereupon,

after hearing the evidence, the arguments of counsel, and the instructions of the court, the jury retired to deliberate upon their verdict, and subsequently returned into court, and being called answered to their names and said: "We, the jury in this cause, find a verdict in favor of the defendants;" and so said they all.

46 Whereupon, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged, and decreed that Isabella McManus, administratrix, etc., plaintiff, take nothing by this action as against the defendants, C. D. O'Sullivan, Wm. F. Cashman, C. M. A. Buckley, for herself; and the minors, John P. Buckley, Edmund Buckley, Vincent P. Buckley, and Mary C. Buckley, by C. M. A. Buckley, their general guardian; Charles Bauman, George T. Bohen, David Hunter, Peter Donohue, John Hayes, Thomas Maguire, and John Doe Hawkins, but that the said defendants do have and receive of the said plaintiff their costs and disbursements incurred in this action, amounting to the sum of $745.50.

Judgment recorded August 16th, 1869.

Stipulation.

[Title court and cause.]

It is hereby stipulated by and between the plaintiff and defendants herein that notice of appeal was filed on the 26th day of January, 1870, by plaintiff, with the clerk of said court, and thereafter and on the same day a copy of said notice was served on the defendants herein, and that a sufficient undertaking on appeal was in due time filed herein with said clerk.

47 It is further stipulated that this case be placed upon the supreme court calendar for the April term, 1870, and be submitted upon briefs—thirty (30) days for appellant to file brief, thirty (30) days for respondent to answer, and ten (10) days for appellant to reply. Oral argument may also be made at the option of either party. The foregoing is a correct transcript on appeal. The proceedings taken for appeal are regular, & the exhibits referred to herein & not inserted may be omitted without prejudice to either party.

JOSEPH H. MOORE,
S. HEYDENFELDT,
For Appellant.
McCULLOUGH & BOYD,
SHARP AND LLOYD,
Attys. for Respts.

SAN FRANCISCO, *March 1st*, 1870.

48 In the supreme court of the State of California.

JANUARY TERM, 1874.

ISABELLA McMANUS, AS ADMINISTRATRIX, appellant, *vs.* C. D. O'SULLIVAN, PETER DONAHUE, ET AL. respondents. } 2340.

Opinion of the court.—Filed March 18th, 1874.

ISABELLA McMANUS, ADMINISTRATRIX, ETC., *vs.* O'SULLIVAN ET AL. } No. 2340.

At the conclusion of the plaintiff's proofs the defendants moved the

court for a nonsuit, but the motion was denied. One of the grounds upon which the motion was rested was "that the evidence does not show or tend to show that the plaintiff or her ancestors, predecessors, or grantors, or either of them, were seized or possessed of the premises, or any part thereof, at any time within five years next before the commencement of this action, or at any time since." In denying the motion for a nonsuit the judge observed that it would have been granted had it distinctly appeared by the plaintiff's proofs that the defendants had held adverse possession of the premises for the period of five years next before the commencement of the action; and further, that should the defendants establish a possession of that character upon their part, he would thereupon instruct the jury to find their verdict for the defendants. The record then proceeds as follows: "Here the plaintiff admitted that defendants would introduce such proofs, and also would produce witnesses to prove that such possession of defendants was taken January 1st, 1862, under claim of title adverse to the plaintiff, but not to the city of San Francisco. Whereupon the plaintiff, by her counsel, in open court admitted, for the purpose of this matter, that the defendants were in the actual, open, exclusive, and notorious possession of the land in controversy for more than five years prior to the commencement of this suit, and on and ever since the first day of January, A. D. 1862, and had held the same from that date adversely to the plaintiff, her ancestors, predecessors, and grantors, and to the estate of T. B. McManus, deceased, but not to the city and county of San Francisco." Upon the admission thus made, the jury were directed to find a verdict for the defendants, which being done, judgment was thereupon rendered, from which judgment the plaintiff presents this appeal.

1. The evidence on the part of the plaintiff tended to show that her intestate was in possession of the premises sued for from some time in 1853, until January, 1861, when he departed this life.

The motion for the nonsuit, in so far as it questioned the sufficiency of the possession held by McManus in his life-time, was determined in favor of the plaintiff, and the decision having been put altogether upon the legal effect of the possession of the defendants, taken subsequent to his death, the propriety of the ruling in the latter respect is the only matter to be considered here.

2. The premises sued for lie within the limits embraced in the judicial decree in the case of the United States vs. The City of San Francisco, entered in the circuit court May 18th, 1865, within the area defined in order No. 800, and the act of the legislature of March 27th, 1868, ratifying that order; and the act of Congress of March 8th, 1866, entitled "An act to quiet the title to certain lands within the corporate limits of the city of San Francisco."

3. If we are to consider the case of the plaintiff as resting solely upon the prior possession of her intestate, and wholly disconnected with the decree of the circuit court, the order of the board, the act of the legislature, and the act of Congress already referred to, it is plain that the possession of the defendants, if adverse in its character, was sufficient, in point of mere duration of time, to bar the plaintiff of a recovery in this action, for their possession, such as it was, began in January, 1862, and this action was commenced only in August, 1867.

4. It is claimed by the plaintiff, however, that the possession of the defendants was not of an adverse character within the meaning of the statute of limitations, and this view is rested in part upon the circumstance that the possession relied upon, though held in hostility to the claim of the plaintiff, was nevertheless held in admitted subordination

to the title of the city of San Francisco. But it has been repeatedly determined in this court that a possession taken and held by a defendant for the requisite period in hostility to the title or claim set up by a plaintiff in the action of ejectment, amounts to an adverse possession against the plaintiff, sufficient to bar a recovery even though the defendant while so in possession admit the validity of a title outstanding and in a third person. Thus in Page vs. Fowler, (28 Cal. R., 611,) the case turned upon a question as to whether the possession of the defendant in that action was adverse in its character, and it was held that it was, notwithstanding the defendant entered upon the land and claimed to hold it, conceding all the while that the title was in the Government of the United States, and which title he was avowedly endeavoring, by entry and occupation, as a pre-emptioner, to obtain—the court observing that to constitute adverse possession it is sufficient if the defendant in possession claim the right against all the world except the United States. Inasmuch as it was conceded in that case that the true title to the premises was in the United States, and that if the defendant should not succeed to it as a pre-emptioner, then it necessarily would go to Page under the act of March, 1863, concerning the Suscol ranch. The claim "against all the world" was, after all, a claim in hostility to Page alone, who was the only person challenging the right of the defendant in that action. The case came again to this court (37 Cal. R., 108,) and it was then held that a person in possession of land with the intent in good faith to obtain the title thereto under the pre-emption laws of the United States must be taken to be in adverse possession under claim and color of title in such a sense that an action could not be maintained against him to recover hay cut upon the premises so in his possession. Again, in Farrish vs. Coon, (40 id., 57,) in defining the phrase adverse possession, it was said here as follows: "The very essence of an adverse possession is that the holder claims the right to his possession not under but in opposition to the title to which his possession is alleged to be adverse." So in Hays vs. Martin, (45 Cal., 559,) this court used the following language upon this point: "It is not requisite that a party who relies upon the statute should show that he claims title in hostility to the United States. He may admit title in the United States either with or without a claim on his part of the right to acquire the title from the United States, and it is sufficient if he has such possession as is required by the statute, and claims in hostility to the title which the plaintiff establishes in the action." In view of these authorities, and others of a like import in this court, which could be found, did time permit, an adverse possession must be taken to mean a possession merely hostile as against the particular claim to which it is opposed in proof, and it results that the possession of the defendants here, though held in admitted subordination to the title of the city, was nevertheless adverse to the title set up by the plaintiff, and therefore sufficient to defeat it unless the plaintiff deraigns her claim from the city of San Francisco, which is the only remaining point to be considered.

5. The lands in controversy lie within the limits defined by the decree of the circuit court of the United States, of May 18th, 1865, and without the corporate limits of the city of San Francisco, as defined by the charter of April 15th, 1851. Under the rule laid down in Gardiner vs. Miller, (at the present term,) the statute commenced to run against the title of the city only upon the passage of the act of Congress of March 8th, 1866, and therefore, if the claim of the plaintiff is connected with the title of the city, the statute of limitations had not run against it

when this action was brought. There was no direct proof at the trial that the plaintiff's claim was in anywise connected with the claim of the city. Counsel argue, however, that the presumption that it was arises from the fact that the plaintiff's intestate for some seven or eight years next before his death, held possession of the premises, which were subsequently, and some four years after his death, confirmed to the city. We know of no rule of law upon which such a presumption could be indulged. That a party in possession is presumed to be rightfully there is true, and in that sense possession raises a presumption of right and of title in the possessor. This is the general rule, and is the doctrine of the cases of Hawxhurst vs. Lander, (28 Cal., 331,) relied upon by counsel, and also of Hill vs. Draper, (10 Barb., 458,) Allen vs. Rivington, (2 Saund., 110,) and Catteras vs. Cowper, (4 Taunt., 542,) cited by him. But a mere naked possession antecedently held by the plaintiff's intestate, and not sufficient in point of duration to entitle him to the protection of the statute of limitations, cannot operate to create a presumption that the claim of the possessor was connected with any particular source of title. It is true that under some circumstances a presumption of a grant to a party in possession may be created, and an instance of that character is found in Mather vs. The Ministers of Trinity Church, (3 Sergt. & R., 507,) cited by counsel, where the court presumed a grant to the plaintiff from the commonwealth for the premises, or a right of pre-emption thereto, upon it appearing that the premises, being in the midst of a very thickly settled country, and being extremely valuable, had been in the possession of the plaintiffs and their predecessors some ninety years, the chief-justice observing that there is no absolute rule prescribed by law on which to found this kind of presumption, and that circumstances may require in different cases a different length of time. But there is no perceptible similarity whatever between the circumstances of that case and those of the one now under consideration, and no foundation is laid for such a presumption in favor of the plaintiff here.

We are therefore of opinion that the mere possession of McManus did not, in itself, tend to connect his claim with that of the city, nor do we think that the case of the plaintiff derives any aid from the decree of the circuit court of May 18th, 1865, nor the act of Congress of March 8th, 1866, (through which decree and act the title of the city is derived,) nor from the ordinance of the board No. 800, nor the act of the legislature ratifying that ordinance, which deal with the terms and conditions upon which that title is to pass to the beneficiaries pointed to in the act of Congress.

McManus was not a beneficiary under the decree of the circuit court, for he did not hold the premises under a grant from the authorities of the pueblo, town, or city of San Francisco, nor was he, nor was the plaintiff as his personal representative, a party in the bona-fide actual possession of the premises, personally or by tenants, at the time of the passage of the act of Congress—for the actual possession, whether held bona fide or not, was at that time in fact held by the defendants, as we have seen already, in hostility to the claim of the plaintiff. If it be even conceded then that, (under the authority conferred upon the legislature of the State by the act of Congress to determine the mere quantity of land which the beneficiaries referred to therein were to receive, and to prescribe the mere terms and conditions upon which such beneficiaries were to receive the lands,) it was competent to the legistature to create a new and distinct class of beneficiaries as being persons who (though not in actual possession by themselves or tenants on the

day of the passage of the act of Congress,) having been ousted from possession before or since said day, had recovered, or might recover the same by legal process, the case of the plaintiff is not brought within the latter category. She had not recovered the premises before the passage of the act of the legislature, nor has she recovered since then. If the act of Congress is even, therefore, to be taken with the modification engrafted thereon, or attempted to be by the act of the legislature confirming order 800 of the board, the case of the plaintiff is thereby brought directly within the views announced in Pickett vs. Hastings, (at the present term,) in which case we held, upon the construction of the provisions of the Van Ness ordinance, in this respect similar to those we are now considering, that where an ouster had occurred the fact of recovery had was indispensable to constitute a person a beneficiary.

It results from these views that the action was barred, and that the judgment of the court below was correct, and should be affirmed, and it is so ordered.

WALLACE, *C. J.*

We concur:

RHODES, *J.*
CROCKETT, *J.*
NILES, *J.*

I, Grant I. Taggart, clerk of the supreme court of the State of California, do hereby certify that the preceding and annexed contains a true and correct copy of the original opinion delivered in the above-entitled cause on the 18th day of March, A. D. 1874, and now on file in my office.

Witness my hand and the seal of the court this 11 day of March, A. D. 1875.

[SEAL.] GRANT I. TAGGART, *Clerk.*

49 In the supreme court of the State of California.

ISBELLA MCMANUS, ADMINISTRATRIX OF THE estate of Terence B. McManus, deceased, *vs.* C. D. O'SULLIVAN ET AL. } No. 2340.

I, Grant I. Taggart, clerk of the supreme court of the State of California, do hereby certify the foregoing to be *to be* the original writ of error, the original citation, and the original bond, also true, full, and correct copies of the transcript, decision, and judgment of the court in the above-entitled action as the same appears of record in my office.

In witness whereof I hereunto set my hand and affix the seal of said court this fourth day of June, A. D. 1875.

[SEAL.] GRANT I. TAGGART, *Clerk.*

(Indorsed:) 2340. McManus v. O'Sullivan. Transcript on writ of error.

(Indorsement on cover:) No. 543. Isabella McManus, as admx. of Terence B. McManus, deceased, plaintiff in error, vs. C. D. O'Sullivan, Wm. F. Cashman, John Hayes, Peter Donohue, C. M. A. Buckley, & the minors of John P. Buckley, Edmund J. Buckley, Vincent P. Buckley, and Mary C. Buckley, by C. M. A. Buckley, their guardian; Charles Bauman, George T. Bohen, David Hunter, Thomas Maguire, & John Doe Hawkins. California sup. court. Filed 3rd July, 1875.

No.....

IN THE

SUPREME COURT

OF THE

UNITED STATES OF AMERICA.

ISABELLA McMANUS,
Administratrix of the Estate of
TERENCE BELLEW McMANUS,
Plaintiff, and Plaintiff in Error.

vs.

C. D. O'SULLIVAN, et als.,
Defendants, and Defendants in Error.

OPENING BRIEF FOR PLAINTIFF IN ERROR.

CALHOUN BENHAM,
E. J. & J. H. MOORE,
SOLOMON HEYDENFELDT,
Att'ys for Plaintiff.

Filed.....

.....*Clerk.*

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA.

ISABELLA McMANUS,
ADMINISTRATRIX OF THE ESTATE OF
TERENCE BELLEW McMANUS,
Plaintiff, and Plaintiff in Error.

vs.

C. D. O'SULLIVAN, *et. als.*,
Defendants, and Defendants in Error.

OPENING BRIEF FOR PLAINTIFF IN ERROR.

This case is brought here by a writ of error to a State Court, (the Supreme Court of California), under the Act of February 5th, 1867, Sec. 2., Rev. Stat. U. S., p. 132, Sec. 709.

The plaintiff below, who is plaintiff in error, declared in ejectment, and the defendants pleaded a Statute of Limitations, which bars ejectment in five years.

On the trial the plaintiff claimed a right and an immunity under the Treaty of Guadaloupe Hidalgo, under the Act of Congress to ascertain and settle private land claims in California, of March 3d, 1851, under the Act of Congress to quiet the title to certain lands in San Francisco, of March 8th, 1866, and under the Act of the Legislature of California, passed in pursuance and by authority of the last mentioned Act, on the 27th of March, 1868. (*Sess. Acts* 1868, *p.* 379.)

The plaintiff proved on the trial that first her intestate and succeeding him his estate had been in possession of the demanded premises seven or eight years, when the estate was ousted by the defendants; also, that the land had been claimed by the City of San Francisco under a Spanish grant, and had been confirmed to the city under the Act of March 3d, 1851, on the 8th day of May, 1865.

The suit was brought on the 13th day of August, 1867.

It appeared that the defendants entered upon the land without color of title, and not under any deed, or conveyance, or license, and with full knowledge of the rights of the intestate's estate; also, that they remained on the land adversely to all the world, but the City of San Francisco, for more than five years, before and until after the suit was brought.

Upon this the Court instructed the jury that the action was barred by limitation of time, and that they must find for the defendants, which the jury did. Judgment was rendered accordingly.

It is obvious the judgment could not have been rendered if the estate of plaintiff's intestate had the right or the immunity claimed under the treaty, and the acts mentioned.

The Supreme Court of California, (the highest Court of Law and Equity of the State,) affirmed the judgment on appeal.

This was error. The action was not barred.

I.

The possession of plaintiff's intestate, and of his estate, was evidence of title, and, as it appeared the true title to the land was a Spanish grant, then only two years confirmed, the possession was evidence of that title.

This proof brought the action within an exception of the Statute of Limitations, which saved it for five years after confirmation.

Limit. Act, April 22, 1850, *Sec.* 6, *as amended April* 11, 1855. (*Sess. Acts*, 1850, *p.* 343; *Sess. Acts*, 1855, *p.* 109.)

Billings, vs. *Harvey*, 6 *Cal.*, 383.

Clarke v. *Huber*, 25 *Cal.*, 596.

Hubbard v. *Barry*, 21 *Cal.* 324, 325.

Morton v. *Folger*, 15 *Cal.* 275.

Catteris v. *Cowper*, 4 *Taun.* 547.

Allan v. *Rivington*, 2 *Saun.* 111, *and cases there cited in Note A.*

Mathews v. *Ministers of Trinity*, 3 *Serg. & R.* 509.

Gibson v. *Chouteau*, 13 *Wallace*, 92.

Gardner v. *Miller*, 47 *Cal.* 570.
Hagar v. *Spect*, 48 *Cal.* 408.

The argument of the State Courts on this point is that the estate of McManus had title, but not the city-title; that is to say, prior possession was proof the estate had title, but not that it had the title which it was in evidence was the true and only title.

We submit that presumption of title is presumption of the true title, and that, when it is proved what the true title is, presumption of title is presumption of that title. Mathematically, of course, the proposition is true. As a legal proposition, we cannot see why it is not true; why, when there is enough evidence to prove a fact in issue, more should be required; why, when a fact is proved for one purpose, it does not stand proved for all purposes; why evidence sufficient to recover land upon—the highest office evidence of title can perform, is not sufficient to prevent a bar. It is an axiom of universal logic that the whole is equal to all its parts—that the whole contains all its parts. Title then is all the title that exists, There can be but one title.

If a plaintiff has a title he has all its privileges and immunities.

It is to be observed that the learned Chief Justice of California, Wallace, delivering the opinion of the Court in this case, enters into no ratiocination on this point. This is a matter of just surprise, as the point of itself was vital to the bar set up, and as plaintiff's argument in regard to it

seems worthy of examination; but most of all as the opinion directly overrules the case of *Hubbard vs. Barry*, before cited. The learned Chief Justice, without perceiving it, doubtless, glosses over the point, by saying that the Court knows of no rule by which possession raises the presumption of any particular title—a remark, of itself, perhaps true, but which did not dispose of all the elements of the proposition the Court had to deal with. The remark did not consider that the presumption was not left unaided, but was supplemented by proof what the title it established was. Of course, if the plaintiff had shown prior possession merely, and no other fact, there might have been room to argue that the Court could not take judicial notice the land was part of what had been confirmed to the city, and so hold that the intestate's estate had that title, and its immunity from the bar set up. But when the proof showed what the particular title was the presumption attached to it, and there was no need the presumption should, of itself, show what particular title it was the plaintiff had.

The learned Chief Justice assumes in the opinion that the title is in the city. No such fact is in the record. The fact the land had been confirmed to the city did not prove it ever belonged to the city after McManus' entry. The case is not to be disposed of on the assumption that title was in the city at the time the suit was commenced. It is to be decided as it would be if plaintiff then had the city's deed, and did not produce it on the trial, but stood on the presumption.

There is no doubt as to the proposition, that prior possession raises the presumption that the party proving it has every title to the land which exists.

In Hubbard vs. Barry (21 Cal., 324), Field C., J., speaking for the Court, says: "In controversies between persons thus situated, [where the lands belong to the public domain], this Court proceeds upon the presumption of a grant from the Government to the first appropriator of mines, water privileges and the like. This presumption, which would have no place for consideration as against the assertion of his rights by the superior proprietor, is held absolute in all those controversies. And with the public lands, which are not mineral lands, the title as between citizens of the State, where neither connects himself with the Government, is considered as vested in the first possessor, and to proceed from him.

"A similar rule is followed by us * * * in controversies for the possession of lands where the real title is not in the Government but is in an individual with whom, or in a corporation with which neither party connects himself. The owner of the true title, not objecting or consenting to the possession of either of the parties, the Court regards the better right, as between the parties, to be vested in the first possessor, and grantees claiming through him."

See also *Tartar vs. S. C. W. & Mining Co.*, 5 Cal., 397. *Atchison et als., vs. Peterson et als. No.* 46, *S. C. U. S. Oct. Term*, 1874. *Basey et als., vs.*

Gallagher et als. No. 126, *S. C. U. S. Oct. Term*, 1874.

The estate of McManus, deceased, being clothed with the city title, brought the action within the protection also of Section six of the Act to amend the Limitation Act, passed April 18, 1863 (*Sess. Acts, p,* 325), which gave until 1868, to bring it. It was brought, as we have seen, in 1867.

If we are right upon this point, the judgment must be reversed.

II.

The McManus estate was in possession of the premises by its tenants on the 8th day of March, 1866, and became thereby vested with an interest in the land, which was not diminished by any subsequent State Legislation, and which carried with it a right of possession.

A right of possession is sufficient for ejectment in California, though unaccompanied by the legal title. (*Tyler vs. Grainger*, 48 *Cal.*, 259).

This right of possession was conferred on the McManus estate about a year only before the suit was brought.

The defendants occupied the land on the 8th day of March, 1866, but they entered without color of title, and with full knowledge of the rights of the McManus estate.

If the *occupation* of an intruder is not to be held the *possession* of the party ousted, and the intruder a tenant of that party, the effect of the Act of the

Congress of the United States was to deprive such a party of the benefit it conferred upon all who had not been unfortunate enough to be the victims of fraud and rapine.

The Court will adopt any other view of that Act, for which a reason can be found, rather than give it so iniquitous and unjust an effect.

It surely cannot be supposed these intruding defendants took the right of possession, or any right to the prejudice of the McManus estate, by the Act of Congress. Beyond a doubt, Congress intended the same policy it had adopted in confirming the Van Ness Ordinance. Field C. J., in *Hubbard vs. Barry*, before cited, says the policy of that Act is based on "the theory that the better right to the bounty of the city rested with the first possessor."

Why, a usurped possession should not, for all purposes wherein the possession can benefit the party entitled to it, continue the posession of that party, as much as property continues always to belong to its owner, we cannot conceive.

The action for mesne profits was formerly *ex delicto*, but the damages were measured by the standard of rent. Though the suit was for usurpation of possession and not *ex contractu*, it did not make the possession the usurper's, except for the theory of the form of the action.

The Supreme Court of California, had in effect decided, before this case was determined, that the McManus estate was the direct beneficiary of the Act of Congress.—It had held intruders were not

beneficiaries of a similar act for lack of good faith. (*Le Roy vs. Cunningham*, 44 *Cal.*, 599).

If intruders are not beneficiaries their possession is the possession of the party intruded on. The possession is not vacant unless abandoned, and abandonment will not be presumed against one forcibly ousted or resisted.

If we come to the strict use of terms, a tenant is not necessarily one who holds by convention. A party in some cases becomes a tenant at will by operation of law. Such is the case of one remaining in possession of land after he has conveyed it to another. A party in such a situation could not make himself any the less a tenant by repudiation of his resulting tenancy. So here it would seem the defendants cannot make themselves any the less the tenants of the McManus Estate by resisting its rights; nor are they the less so because they denied its rights, when they employed force or usurped leave to enter. They ought not to have more rights because they are wrong-doers than they would have as conventional tenants, or tenants at will by operation of law. If they were tenants by operation of law, their possession would be that of the McManus Estate; and if they made themselves tenants by usurpation, it would seem they are tenants at will.

In *Brooks v. Hyde* (37 *Cal.* 366), the Court say they are inclined to think the Van Ness Act of Congress intended only conventional tenants. But in *Irvine v. Adler* (44 *Cal.* 559), they say the word *tenant* includes tenants in common. There is no convention between tenants in common. They

hold independently of each other. Though they hold for each other in holding for themselves, they do not hold under each other. Each may hold all by virtue of his own right.

Is the policy—the equity of this act of the nation's beneficence—to be defeated because the word *tenant* in some cases means a conventional tenant, or because in other cases, where there is no element of convention, the term is not used at all?

It would seem quite enough that there may be tenants by operation of law to warrant the conclusion that Congress intended to give the land to the parties entitled to the possession.

This view of the effect of the Act of Congress has been adopted by the Legislature of California. The Act of March 27, 1868, before cited, gives the land to the party who had the right to recover it. And that right accrued on the 8th of March, 1866, because the grant is by words *de presenti*.

Schulenberg v. Harriman, U. S. S. C. Cases, Oct. Term, 1874.

The question has been mooted whether Congress had power to create trusts in the land confirmed to the city; but it is not involved here, as the city, with the approval of the State, adopted the Act of Congress.

III.

If the McManus Estate was not in possession of the demanded premises on the 8th day of March, 1866, and so the owner, the Act of the Legislature

of the 27th of March, 1868, Section 11, gave it a right of possession, as being *entitled to the possession* on the 8th of March, 1866.

The Act of the Legislature was passed by virtue of power delegated to the State by the Act of Congress of March 8th, 1866, and operated by relation as of the date of that Act, which, as we have said, was only about a year before the suit was brought.

Bernal v. Lynch, 9 *Wallace*, 325.

The premises being within the Act, the McManus Estate, by virtue of the possession it had had of them, having a right of possession, which it is not pretended was barred on the 8th of March, 1866, was entitled to recover on that day.

The construction of the 11th Section of the Act of the Legislature we contend for, is not admitted. It is held that persons ousted from lands within that Act had to recover possession before they could receive any benefit from it.

In *Brooks v. Hyde* (37 *Cal.* 366), the Court did not object that a party seeking the benefit of the Act in question had not recovered, but freely examined whether he was entitled to have done so.

In *Pickett v. Hastings* (47 *Cal.*, pp. 285, 286, 287), it is sharply ruled, however, upon just such a statute as we have here, that recovery of possession is an indispensable prerequisite to the vesting of the title given by the Act.

This last case is expressly affirmed in the case at bar.

McManus v. Sullivan, 48 *Cal.* 7.

It will be observed that the Act of the Legislature distinctly recognizes the right of those ousted before the 8th of March, 1866, to recover at some time or another; and it applies the words *may recover* to those ousted after the 8th of March, 1866, as well as to those ousted before. Certainly it will not be denied that those ousted after that day, and who were in possession on that day, are beneficiaries of the Act of the Legislature, and could recover the land as such beneficiaries, if for any reason it should be necessary to invoke that character. And if the words *may recover*, as applied to those ousted after the 8th of March, 1866, are not to be interpreted *do recover*, they are not to be so interpreted when applied to those ousted before that day.

The construction given to the Act by the Court below obliterates the words *may recover* from the text. If it cannot be known one may recover, or if one cannot take, until he does recover, the words *may recover* are useless, because one who has recovered becomes the beneficiary of the Act under the words *has recovered*.

The declared intent of Section 11 of the Act was to pass the title then—*in presenti*. The construction adopted by the Court below would not have passed the title then for lack of an appointee, but would have reserved it for a grantee to be designated by a future fortuitous event. If the grant was to one *entitled to recover*, it was certain as to the grantee, and did pass the title; if to the person who might recover, it was left to the chapter of accidents of a law suit.

The question assails the mind from time to time, in endeavoring to fix the meaning of this Act, why, if the McManus Estate was entitled to recover without calling the Act to its aid, it did not do so—why it invoked the Act?. But the answer is very plain. The estate had a right to recover on the 8th of March, 1866, *aliunde* the legislation. That right, it is said, is barred. But by virtue of that right before it could have been barred, the estate got another right—a new right, which was not barred. Of course, it invoked it.

It is questioned by the Supreme Court of California whether the Legislature had the power to appoint a new class of beneficiaries of the Act of Congress—parties ousted before March 8, 1866. *The power was very fully asserted in Dupond v. Barstow*, 45 *Cal.* 454.

It has been decided that the defendants did not take for lack of good faith.

Le Roy v. Cunningham, 44 *Cal.* 599.

There being no beneficiary to take the premises, if physical *bona fide* occupation by the party entitled to possession was necessary, the question arises whether any title or control as to the premises remained in the United States after the Act of Congress? If there did not the appointment by the City and State is good. If there did, the appointment is good as a license to occupy. (*Sullivan et al. v. Hubbard et al.*, 18 *Cal.*, 508.) Such an appointment by the trustee of a naked trust—as against all parties, save the creator of the trust, is good.

The right of possession granted to the McManus Estate by the Act of the Legislature—viewing that Act as its sole source of title—was a right held under a title confirmed by the Act of Congress of March 8th, 1866—only about a year before the suit was brought.

Gibson v. Chouteau, *Gardiner v. Miller*, and *Hazar v. Spect*, before cited.

IV.

The plea of the Statute of Limitations was not proved.

1. The defendant's did not claim title. They did not claim exclusive title.

They recognised title in the city. Limitation is title. It is equivalent to the *prescription* of the civil law. It therefore must satisfy the text of the Statute, and be accompanied with a claim of title, exclusive of every other title and prescribe against all the world. (*Arrington vs. Liscom.*, 34 *Cal.*, 372.)

This case was heard twice below. The Chief Justice dissented when the first decision was rendered. We quote his dissenting opinion. He puts our argument in a more vigorous way than we can:

"I dissent from the opinion and judgment of the majority of the Court, on the ground that the possession of the defendants, which is conceded not to have been held adversely to the title of the City and County of San Francisco, cannot, for that reason, be considered to have been an adverse possession.

to be availed of by them for any purpose whatever. I am unable to distinguish between the effect of a recognition by the defendants of the city's title, and their recognition of the title of any third person in an inquiry into the character of their possession as being, in a legal sense, adverse, or otherwise. Nor in view of such admitted recognition of an outstanding title, either in the city or in a third person, can I understand in what way such a possession of the defendants, however long continued, would ripen into a title in them for any purpose, under the doctrine of *Arrington vs. Liscom* (34 *Cal.*, 365). The possession which if held during the requisite period, would operate to create a right in the defendants, must be one held adversely to all the world, 'with intent to claim the fee against all comers,' and unless it be of that character, it must upon the general principle recognized in the opinion of the majority, fail to vest the title in the possessor. A recognition by him of title outstanding in a third person, must necessarily operate to change the character of the possession, and, in this respect, it matters not, in my judgment, whether the recognized title be in the United States, in the City of San Francisco, or in some private person. The recognition by the defendants of a superior outstanding title in any quarter, is absolutely incompatible with a simultaneous adverse possession upon their part, for that is made up not only of the fact of possession, but of the *quo animo* with which that possession was taken and held.

"WALLACE C., J."

Upon reading the final opinion of the Supreme Court of California in this case, delivered by Wallace, C. J., after a re-hearing, and remembering the one quoted above, we were reminded of an anecdote of Lord Eldon.

At the outset of his career, he argued the case of *Akroyd v. Smithson*, and gained it. Later, before Dunning, Chancellor of the Duchy of Lancaster, he got up to maintain the doctrine overthrown in that case. Dunning said to him, "Sit down, sir." When Scott did so, Dunning went on: "Your name, sir, is Scott?" Upon being told it was, he said, "You argued *Akroyd v. Smithson*." Scott said he did, and Dunning said, "I have read your argument in that case; neither you nor any man in England can answer it. I won't hear you."

Page v. Fowler, and the other cases cited by the Supreme Court of California, as authority to the point that adverse possession is established if hostile to the plaintiff alone, are not conclusive. The necessities of a country where large bodies of agricultural land were withheld from sale by the U. S. in compliance with treaty obligations, and where all the mines were upon public land, and from motives of national policy, not sold at all, may well have induced the Courts to construe the Statute of Limitations, relatively to the United States, as they have done, even if they were not bound to do so by the maxim, *nullum tempus occurrit regi*. But it has never been held and never should be held that a possession not in defiance of every title susceptible of being barred is adverse in the mean-

ing of the Statute. Here the city's title was recognized. The very title the plaintiff shows herself entitled to is expressly recognized, and yet the plaintiff is barred! True, the city could not be barred of her action for lands claimed under Spanish grant, as these outside lands were, all of which are above high-water mark; but the immunity of the action for those lands was statutory, not inherent (*City v. McCracken*, 16 *Cal.* 591), and was ineffectual if not set up.

The position taken by the Supreme Court of California on this point presents the anomaly of barring plaintiff, when his trustee, or lessor, or licensor is not barred, in an additional strange light—a *cestui que trust* is barred, whose trustee cannot be barred unless with his own consent—which is a contradiction in terms—which is making a bar without any hostility.

2. The plea set up the 10th section of that statute, and none other. It averred entry by the defendants under a deed and claim of title, and the evidence showed that the defendants did not so enter, and never claimed title.

CALHOUN BENHAM,
E. J. & J. H. MOORE,
SOLOMON HEYDENFELDT,
Attorneys for Plaintiff.

Service accepted by copy, this.....

day of July, A. D. 1875.

Attorney for Respondent

No.....

IN THE

SUPREME COURT

OF THE

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ISABELLA McMANUS, Administratrix of the Estate of T. B. McMANUS,

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Defendants in Error.

PLAINTIFF'S REPLY TO THE Points and Authorities of Defendants in Error.

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January 11, 1876.

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IN THE SUPREME COURT

OF THE

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No. 543.

IN ERROR TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA.

BRIEF FOR THE PLAINTIFF IN ERROR
IN REPLY TO POINTS AND AUTHORITIES AND
BRIEF OF THE DEFENDANTS IN ERROR.

ABSTRACT OF THE CASE.

The action is ejectment for lands affected by the Act of Congress of March 8th, 1866, entitled "*An Act to quiet the title to certain lands within the corporate limits of the City of San Francisco.*"

The Act is in the appendix to this brief.

The plaintiff's action was commenced on the 17th day of August, 1867. The Statute of Limitations was pleaded, *setting up entry under a deed and claim of title.*

A trial was had before a jury on the 10th of August, 1869.

Under peremptory instructions to the jury that the action was barred, and that for that reason alone it should find for the defendants, it did so, and judgment went accordingly.

An appeal was taken to the Supreme Court of the State, which affirmed the judgment, Wallace, C. J. dissenting.

Wallace's dissenting opinion is printed at length in the opening brief of the plaintiff in error.

Upon a rehearing the order affirming the judgment was adhered to.

The last opinion is in the record; the first was omitted both from the record and from the published Reports of California Decisions, but for what reason does not appear. It is printed in the appendix hereto, as it was published by authority.

The record shows it was in evidence the plaintiff's intestate enclosed the land, built a dwelling-house upon it, cultivated a garden upon it, made charcoal for market upon it, and resided upon it

for more than six years, and up to the day of his death, January the 15th, 1861.

The record shows it was admitted on the trial as a part of the plaintiff's affirmative case that the land was claimed under a Spanish grant, confirmed on the 18th day of May, 1865, and was part of what was relinquished by the Act of Congress mentioned to the City of San Francisco in trust for parties in the *bona fide* actual possession thereof, on the day of its date.

The record shows it was proved by the admission of the plaintiff, as the defendants' case, that they had been in possession of the land ever since January the 1st, 1862, and for more than five years next before, and up to the commencement of the suit, adversely to the intestate estate, but not adversely to the City of San Francisco.

The defendants offered on their own part no other testimony than the admission of their possession.

There is no evidence in the record that the defendants were on the land earlier than January the 1st, 1862. The defendants' brief contends they were. The effort is made, in order to show for purposes of their argument, which will be examined hereafter, that the intestate Estate was barred when the Act of Congress mentioned was passed.

Cook, a witness for the plaintiff, stated that J. P. Buckley told him in April or May, 1861, he had taken up the land, but not when. At that time, too, Buckley, if he had then already taken up the land, did not claim adversely even to the intestate Estate, nor indeed as late even as August,

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1862, although from a failure to see the force of the evidence of Sheridan, a witness for plaintiff, and from an over-weening confidence that it would be held a rule of property the defendants' possession must be universally exclusive, it was improvidently admitted the defendants' possession was adverse to the intestate estate as early as January 1st, 1862. In August, 1862, Buckley surveyed the land, and told Sheridan he had taken "a part of McManus' land as there was no owner for it," and that he would rent it to him until some one (meaning some one on the part of the intestate estate) should come for it, and that then he would deliver it up.

Sheridan states, it is true, that this conversation was had in August, 1861, but he says also that it was after the great flood of the Sacramento River, which is a memorable event in the history of California, inasmuch as it flooded the Capital to a great depth, and drove the Legislature to San Francisco, and that flood was in the winter of 1861,–62. (*See Sheridan's testimony, Trans., p.* 13).

An effort is made by the defendants to show that the plaintiff admitted they had held the land adversely for five years next before suit brought against all the world ; but the Court will see that the admission was restricted *ex industria*, so as to show that the possession was not adverse—if, to be so, it had to be, in the words of the Statute, *exclusive of every other right* than the holder's.

In their sworn answers the defendants claimed that they had always held subordinately to the City

of San Francisco, and had all the time been seeking to *make* title under the City.

Upon defendants showing that they had held five years, but expressly recognizing the title of the City all the time, and never claiming against it, the Court gave the peremptory instructions mentioned.

The plaintiff contended on the trial and throughout the case that she had showed title under the City of San Francisco, which claimed the lands under a Spanish grant, and that her action was saved from the bar by a *proviso* of the statute exempting such lands from its effect until after confirmation.

The plaintiff also contended that she proved on the trial a title under the Act of Congress of March, 8th, 1866, which was not old enough when the suit was brought to be barred.

THE ULTIMATE FACTS.

The plaintiff showed a grant, including the demanded land, confirmed by the Circuit Court on the 8th day of May, 1865, about two years before suit; also prior possession by the intestate in person from 1853 to 1861, and possession by the defendants at the commencement of the suit.

The defendants showed a possession for five years, but held confessedly all the time subordinately to the title of the City of San Francisco, and had judgment.

HOW PLAINTIFF GETS A RIGHT OF APPEAL.

The plaintiff appeals to the Federal Court because she proved title under a Spanish grant, and

a right, also, under an Act of Congress, the vesting of which in her intestate has been denied by a State Court through error as to the law of evidence, and as to the meaning of the Act of Congress, and on the pretext of an adverse possession, which could not affect those rights (if vested) prior to the Act of Congress, and did not continue long enough afterwards to bar them, and which was not adverse in the sense of the statute of limitations.

She claims that she showed title under the Spanish grant by proof of the intestate's possession just as well as she could have done by deed, and that she showed the intestate's estate is the direct beneficiary of the Act of Congress by proof of possession on the 8th of March, 1866, and if not directly the beneficiary of that Act, that she is indirectly by virtue of the State Act, which has given the land to the intestate's estate as being *entitled to the possession* on the date of the Act of Congress.

The plaintiff was compelled to claim that she had a right under the guaranty and protection of the United States to secure her action from the statute of limitations, interpreted as the defendants claimed, and the Court held it should be, and evidence and argument were offered to support that claim.

The nature or origin of the plaintiff's right was not set out in the pleadings because it was not necessary it should be in the complaint, and no replication was allowable, and no cross bill was filed calling for an answer, and no objection was taken to the evidence of the source of the plaintiff's right for want of allegation.

It is held that, when such a claim is denied by a State Court, and a writ of error is sued out from the Federal Court, the appeal must be entertained, reserving to this Court to see what it will do about the questions involved.

(*Murdock vs. City of Memphis*, 20*th Wallace*, 636.)

THE JUDGMENT MUST BE REVERSED.

It is plain that the intestate estate had a right to recover a tract of land, which had been granted by the former and by the actual sovereign.

It is said, however, that the question, whether the intestate estate had a right to recover the land or not, required a ruling upon evidence, and a construction of a State statute; and that the Federal Court will not reverse but will adopt the rulings upon evidence, and the constructions of State statutes, by State Courts.

This has been too often so decided *as to construction of State statutes* to admit of controversy, but the construction must be a fixed and accepted one; it must have become the settled law of the State; it must have become an acknowledged rule of property, and it must not involve any question, whether a right has been derived from the Federal government or vested under its laws, else it is not binding on the Federal Court. That Court is governed by even a settled construction of the statutes of the States, not by force of law, but by policy and comity. By the Constitution, and by the 34th section of the Judiciary Act of 1789, it is the duty of the Supreme Court of the Uni-

ted States to administer the State statutes itself, and to do so it must construe them in all cases beyond the rule of comity; and it is as Supreme over the State Court, when called on by its jurisdiction to construe State statutes, as any Appellate Court is over its Court of first instance.

Green v. *Neal*, *O. Peters*, 295, affirmed by *Leffingwell* v. *Warren*, 2 *Black*, 603.

Porterfield v. *Clark*, 2 *Howard*, 125, *bottom of the page.*

It has been held that one decision may settle a rule, but obviously it must have been satisfactory to the Court, and acquiesced in by the parties and the community.

The construction or application of the statute of limitations here to be examined is not a fixed and settled one.

The defendants and the State judges now on the bench labor hard to make it appear so, but they cannot.

Those judges say that certain cases which they cite permit the statute to run where the title is in the United States, and that those cases have settled its construction as only requiring proof that a defendant has denied the title of the party suing him.

The cases they cite have never been accepted by the profession. The doctrine they are supposed to lay down has been assailed in argument in the Courts of California, ever since the first one of them was decided. It was utterly exploded by Wallace, C. J., in the dissenting opinion delivered in the case at bar ; and utterly ignored by Field, J., in *Adams* v. *Burke*, cited hereafter.

But whatever effect the protest of the lawyers might have, or not have, certain it is, the idea that any but the Federal Government's title could be excepted and left out from the exclusion of title required by the statute, had never been broached until the decision of the plaintiff's case, and is not involved in the cases relied on by the Court. No case was cited, nor can a single one be produced in which it has been contended, much less held, that when a party claiming the benefit of the statute admits he recognized the land as another's all the time he held it, he is deemed to have had adverse possession. The contrary was settled in *The City of San Francisco* v. *McCracken*, 16 *Cal.* 591; and in *Garrison* v. *McGlockley*, 38 *Cal.* 79.

To say that the ruling the United States may be left out of view is authority for leaving all the world but the plaintiff out of view, is not sound. The proposition is one of the chief points of the opinion of the State Court. It cannot be submitted to. It violates the text of the statute. The section of the statute pleaded here—indeed every section of the statute—requires the party seeking to bar to claim a right in the property, exclusive of everyother right.

The ruling, the United States need not be excluded in the occupant's claim of title, was plainly an innovation itself, if not *obiter*, and it is unphilosophical to cite an innovation as authority for any thing outside of or beyond the precise conditions for which it provided; to do so is reprehensible in counsel — unpardonable in a judge. The United States cannot be barred but cities may be. It is

obvious the leaving of the United States out of view was an attempted graft upon the statute. It was an exception to a rule of the statute made by the judges. Exceptions *prove* rules; they cannot be authority for taking them away. If better evidence than inspection is required, that the class of cases under consideration is no authority for an occupant seeking to bar not to exclude any other beside the United States in his claim of title, it will be found in the dissenting opinion delivered by Wallace, C. J., on the first determination of the case at bar. In that opinion, he not only denies that the principle of those cases applied in a case such as the one at bar, but denounced them in effect as being in the teeth of the statute, and contrary to the settled doctrine that limitation is title.

Other cases have been decided in California since the case at bar, reannouncing the doctrine applied to the plaintiff, and are cited against us, but they of course cannot be allowed to settle a rule appealed from in the case where first laid down.

The precise question whether the plaintiff's prior possession *accompanied by proof the land was claimed under a Spanish grant* raised the presumption that the plaintiff claimed under such a grant, in the sense of the Spanish proviso of the statute, was never mooted until in the case at bar, unless in *Morton* v. *Folger*, 15 *Cal.* 275, and, if then, it was decided as the plaintiff contends it should be. *It is a question of the law of evidence.* The ruling upon it must be reviewed to get at the question whether the plaintiff proved she had title under a Spanish grant. If

she did so prove, the action was not susceptible of being barred.

This Court must examine the ruling of the State Court as to the canon of evidence supposed to prevent plaintiff from being held to have had the city title, and as to the canon of construction applied to the Statute of Limitations which obliterates its text. To do so "is but a step in the cause." It is necessary to take it before the question can be decided whether the particular Federal right denied by the State tribunals can be accorded or not. If the intestate estate was not barred it is the beneficiary of the Act of Congress, for one or another of several reasons, which will hereafter appear; and if it is the beneficiary of that Act the Court has jurisdiction, and the judgment must be reversed. This precise point has been determined by the Supreme Court of the United States. The case was one involving the question whether certain lands had been confiscated under the laws of Maryland. The question had to be determined preliminarily, because if the lands had not been confiscated under the State laws, they were protected by the treaty with Great Britain in behalf of the tories in our revolution. It was contended the decision of the State Court as to the effect of the State laws could not be reviewed. The Supreme Court of the United States scouted the idea.

Smith v. *Maryland*, 6 *Cracnh*, 304.
Martin v. *Hunter's Lessee*, 1 *Wheaton*, 357.
Fairfax's Devisce v. *Hunter's Lessee*, 7 *Cranch* 603.

When evidence is offered to prove a party has a Federal right, and its effect to do so is denied by a State Court, the ruling may be reviewed, and, if wrong, reversed.

This is expressly decided in *Mackay* v. *Dillon*, 21 *Howard pp.* 420, 421.

The right to review the decision as to whether the intestate estate is the beneficiary, directly or indirectly, of the Act of Congress, is, of course, not denied.

If the evidence showed the intestate Estate had title under a Spanish grant not five years confirmed when suit was brought, that title gave the plaintiff immunity from limitation by the terms of the State law for five years next after confirmation—if not, for five years next after definitive grant of the legal title. Now, shall the State Court by a ruling on the law of evidence as to how facts, contemplated by its Statutes of Limitations shall be proved, conclude the plaintiff to say that the intestate has title under the Federal source of title, and so is entitled to the benefit of protection from the bar? It is said the rule laid down in *Murdock* v. *City of Memphis*, (20 *Wallace*, 636) resolves that the Federal Court will not review the determination of any question by a State Court, except such as are purely of Federal cognizance. If by this is meant that the State Court may so expound the law of evidence as to find the conditions giving title under a Federal source not proved, it may defeat everything short of a patent issued directly to the plaintiff. Take the case where one has a deed of bargain and sale of a tract of land held under an unconfirmed Mex-

ican grant, and after patent issued he sues in ejectment, and the State Court say, the patent does not inure to him, shall it be said the Supreme Court of the United States may not reverse the judgment? If the case put were decided by a Circuit Court, the judgment would be reversed. Such a judgment was reversed in *Landes* v. *Brant*, (10 *Howard*, 348).

The doctrine of enurement belongs to the common law, and the Supreme Court of the United States has as much right to expound it as the State Courts.

Take a case, which occurs every day, where Congress grants land to parties who shall be able to establish certain facts *in pais*, and suppose it to be declared by a State Court that, according to its views of the law of evidence, one of such facts is not established, will not the Court reverse it if it is wrong? May not the Federal Government through the proper organ say whether the conditions it called for itself exist or not?

The "*laws* of the State shall be rules of decision in the United States Courts" (*34th section Judiciary Act*, 1789.) In almost all the cases in which the Supreme Court of the United States has said they will follow State construction of State laws, statute law only has been involved.

Confined in its effect to that kind of law, the 34th section of the Judiciary Act is wise, and leaves some power to the Supreme Court of the United States. It leaves it free to correct any error of construction of State statutes not fixed and accepted, or any error as to the law of evidence, committed by a State Court. The case at bar illustrates. Here

the State Court has misconstrued its own statute in the most revolting manner. They have said a man who, without deed or license from any one — not claiming title at all, but, on the contrary, expressly disclaiming it, and recognizing it as in a corporation equally subject to limitation as an individual, (*City of Cincinnati* v. *Presbyterian Church*, 8 Ohio, 298, *Cincinnati* v. *Platt Evans*, 5 *Ohio*, 602). ousts his neighbor from his peacable occupation, may get title under a statute requiring entry under claim and color of title. More: they have said he may do this and it shall satisfy a plea alleging entry under a deed. They have said what Wallace, C. J., denied on his first treatment of it — what Field, J., has lately exposed as a legal heresy, if not an absurdity.

Adams vs. Burke, O. C. C. U. S., August, 1875. *Pacific Law Reporter of November*, 1875.

They have violated a great principle of the law of evidence common to the Civil and the Common Law to defeat this plaintiff, and the clearly expressed will of the people, by deciding that possession is not presumptive evidence of title. They have so decided when the contrary has been held by the Supreme Court of Tennessee, (*Gray et al.* v. *Darby's Lessee*, 1 *M. & Y.*, 413.) and confirmed by the Supreme Court of the United States, (*Green vs. Lessee of Neal, ut supra*) in the precise conditions presented by the plaintiff's case. They have in so holding tacitly approved a decision (*Tynan vs. Walker*, 35 *California*, 634) which attributes an effect to the stat-

ute of limitations diametrically opposite to what has been attributed to it from the time of Henry the VII., and James the I. of England (21 *Jac. statute of limitations; statute of fines*, 4 *Hen., VII*) — they have said rights may be taken away by the statute when there is no one to enforce them when they arise, thus giving to the bold marauder the lands of infants, married women, absentees and other helpless persons provided for under trusts. They have utterly ignored the jurisprudence of California, as settled, and notably, by the case of *Hubbard v. Barry* (21 Cal., 324).

The Supreme Court of the United States has followed the State Courts in rulings upon evidence (*Patten's Lessee v. Easton*, 1 *Wheat.*, 476), and in construction of instruments (*Jackson vs. Chew*, 12 *Wheat.*, 167). And it is claimed it declines to reverse any case or writ of error to a State Court unless the error consists solely in a direct denial of some Federal right.

This would be not only refusing to go as far as the minority of this Court thinks the law permits, but would circumscribe the power of the Court more than the 25th section of the Judiciary Act of 1789 did. Under that act the Court disposed of all questions necessary to reach a Federal question though they were questions of State law. (*Smith vs. Maryland*, 6 *Cranch.*, 304.) It said to the State Courts, you shall not depart from received canons of construction, of evidence, or of pleading, and so take away by indirection what you cannot take away directly; your power is not exclusive as to remedies and practice. We will not apply but we

will correct new-fangled rulings as to your State laws as long as they are not yet fixed rules of property.

The writ of error granted by the Supreme Court of the United States will become a mockery if the State Courts can declare in their opinions by some scandalous and new-fangled exposition of State law — especially remedial law — that a Federal right demanded does not exist or defeat it by some denial of plain canons of evidence or of pleading. The truth is that the Supreme Court of the United States must have as much power to say what the State law of construction, of evidence, and of pleading, affecting a Federal right, is as the State Court.

Look at the case at bar. The *Legislature*, bowing to the obligation of duty, and the Act admitting the state into the Union, say to the owners of Mexican grants, we will not interfere by the statute limitation, with your grants, until they are patented; in other words, if you have a Federal right to the land you shall not be barred, until five years after patent. After this language is held by the people, one in possession is ousted. The State *Courts* say to him, you must exhibit to the trespasser the title by which you were in possession, and if it is not perfect, you are barred. It must not only be in writing, but it must be perfect. *This*, when such a rule of evidence had never been laid down; *this*, on a statute not giving a trespasser its benefits, on a verified plea of entry under a deed, where there was not only no deed produced, but where there was a sworn statement in the same plea, that the land was the city's, and that defendants had always

so recognized and that the defendants had no deed but were trying their best to get one. All this, it is said, the State Courts may say and cannot be reversed.

The effect attributed by the defendants to the case from 20th *Wallace*, will superinduce a strange anomaly if admitted. It will present a Court recognizing two codes of law, disposing of the same subjects differently, as in force at the same time in the same State. The identical questions presented here are, we will suppose, involved in a writ of error to the Circuit Court of the United States in California, and this Court says the ruling is wrong on the construction of the statute of the State, wrong as to the evidence, wrong as to the pleadings, and the same day it rules on our writ of error to the State Court in this case, that the Federal right denied is lost, because being taken away by a ruling on evidence, pleading, or construction —by indirection, it cannot help us.

The Supreme Court of California, and the Circuit Court of the United States, are coördinate as to Federal questions.

Gibson v. *Chouteau* (13 *Wallace*, 92) governs this case. Rightly understood, it provides for the whole subject it treats of. It declares an action for the recovery of the possession of land, shall not be barred by any lapse of time anterior to the issue of patent. It expressly places itself on the clear ground, that the State shall not interfere with the primary disposal of the public lands. It involves a prohibition to the States to interfere with the use of the public lands, at all events it forbids Judges

under the plea of necessity, with a Legislature meeting every two years, to violate the letter of the State statute—the jurisprudence of the world as to statutes of repose, for the purpose of interfering with the use and occupation of the public lands. And what is this plea of necessity? the State got along well enough not to induce legislative action for many years before *Page vs. Fowler.*

The position that a Federal right, indirectly declared not to have vested, by misapplication or misconstruction of a State statute, or by erroneous ruling as to evidence or pleading, may not be protected on writ of error to a State Court, has the vice of denying a minor power which is involved in a greater power. It denies power to correct an error as to the meaning of a law, when if the law were plainly what it is construed to be, no one will deny the Court the power to set the law aside. In other words, the State Courts have more power to make law than the Legislatures.

We respectfully submit that the mere construction of a State statute, by a State Court, is not so within its sole and peculiar province as to forbid review here when it amounts to a denial that a right has been derived from the United States, or is under Federal protection. The National Government and the State Government are distinct and independent governments; and, in the protection of rights conferred by the National Government, it has the power to review all Courts in the application thereto of such rules and canons as are *juris gentium.* The canons of construction and the laws of evidence are such—of their nature—of the nature of things—

that they must be the same every where on the globe — the same amongst all nations. It would be a curious proposition, that a solemn treaty between two nations could be declared not to give a right by the application of some rule of construction peculiar to the recalcitrant party; or that a right, guaranteed by a treaty, should be taken away by the application of some local rule of evidence peculiar to the country, when the right was to be exercised.

We repeat that rules of evidence and rules of construction are *juris gentium*; that, at all events, there are, of necessity, rules of evidence, and rules of construction common to mankind, and alone applicable to questions arising between governments.

Here, the apparent right of the intestate estate to the land guaranteed by the treaty, and the act to ascertain and settle private land claims in California, is taken away by the denial of a rule of evidence universally recognized, by a process of reasoning, which involves the absurdity of accepting possession as proof of title for one purpose and not for another; and yet, this fallacy is claimed to be sacred because State Courts alone are supposed to have the right of saying what the law of evidence is.

Here a right, declared by this Court, in *Gibson* v. *Chouteau*, *ut supra*, and by the State Court following that ruling, to be safe from the law for five years after patent is taken away, because the plaintiff has not exhibited to a trespasser upon his possession, a paper-title from the patentee.

Here is a right to a Mexican grant, or to part of one, proved on satisfactory evidence, taken away while

under the ægis of the United States — before the legislative grant of it is five years old, under the pretext that there is need for construction of a State statute—under the pretext that it is necessary to inquire what title need not be excluded by a claimant of adverse possession, when the statute controlling the subject expressly says, every other title but the claimants must be excluded by his claim. Construction begins with ambiguity, and under no such pretext as that ambiguity exists, where ambiguity there is none, shall a right, so protected, be taken away without the possibility of retrieval, because it is a State Court which has been guilty of so bald and intolerable a tyranny.

The true rule would seem to be that when a right claimed under the United States, *and accorded in the State Court*, is yet taken away by a settled construction of some constitutional State law, the Court will not reverse. Here if it had been conceded that plaintiff showed title under a Spanish grant, she could not have been barred.

The fallacy of defendants' position is in the fact that the State Court denied plaintiff's claim of Federal right.

But let us subject this case to the tests of *Murdock v. City of Memphis*, as defendants understand it.

Was there a Federal question raised?

The record and opinion both show there was in several ways.

The rights claimed were each and all denied.

One right claimed was the right of property in a part of a Spanish grant not patented or conveyed

by Congress five years when the suit was brought, as proved by prior possession.

If that right had been conceded, the plaintiff would have had judgment, because the defendants showed no title or bar, except under the statute of limitations, and that statute did not run against a Spanish grant not yet confirmed by patent, or legislation.

Was that right properly denied ?

It was not properly denied. The plaintiff proved the land was a Spanish grant, and that the intestate Estate owned it. She proved the land was claimed under a Spanish grant, in the proper Court, and she proved that the intestate Estate owned it by showing that Estate was in possession of it when defendants entered.

It is not contended that the fact the land was claimed under a Spanish grant was not proved ; and that possession was sufficient evidence the Estate owned the Spanish title, is established by the rule that possession is evidence of title.

And that possession will serve in lieu of paper title to connect the Estate with the Spanish grant, is the direct and legitimate effect of the rule that it is proof of title.

This is the effect also of the authorities, especially of the case of *Gray & al. v. Darby's Lessee* . (1 *Martin* & *Yerger*, 413).

If possession was not evidence the intestate Estate had the City title, it stands in this inquiry as a trespasser when there is no evidence to give it that character, and in this particular action could be

none, and when the fact of its peaceable possession when ousted, proves the contrary.

What hope there was of arriving at a conclusion just to the plaintiff, when a peaceable occupant was placed in the opening of the inquiry *in equali jure* with avowed trespassers upon his rights in a suit concerning their trespass, may readily be seen.

As *Murdock* vs. *The City of Memphis* is cited against us, it may be supposed by the defendant that this Court will not reverse the State Court in its ruling as to the sufficiency of the evidence to show that the intestate Estate claimed under the Spanish grant, even if it is satisfied that ruling in error, and that this Court will decline to reverse that ruling, on the ground that the State Court has an exclusive right to say what the law of evidence is.

In considering whether the ruling on the sufficiency of the evidence to show the intestate Estate claimed the land under a Spanish grant may be reviewed, it is to be observed that the question before the State Court was not what the proviso in the State Statute meant, but how the fact securing exemption from the bar should be proved. Constructions of State statute-law by State Court, it is agreed will be followed by the Federal Courts, whether exercising appellate or original jurisdiction, when they have become fixed and settled rules of property. But it has been held that State courts will not be followed in the application of general principles of jurisprudence, unless they are right.

As to what the law of evidence is in a particular about which the State Legislature has not acted, the State Courts have no peculiar or exclusive right to

govern, and especially they have not, when the question is whether the facts, constituting a right to be protected by the United States, are proved or not.

If the Supreme Court of the United States is to be told, whenever it examines the grounds on which a State Court has denied a right claimed to be under protection of the United States, that the right was denied on some rule of pleading, or of evidence, or by some new construction of a State statute not within the province of its jurisdiction, it will be difficult to retain any.

It would seem that if the Court has a right to review a decision as to a Federal right, it has a right to judge of pleading and of evidence as well as the State Court. How can a Court review another, unless it has jurisdiction over all the matters necessary to its decision. Evidence, pleading, and construction are but *media* of getting at the rule of ultimate right, and the appellate Court must have the same power to judge of them as the *nisi prius* court. Suppose the Supreme Court of the State of California, in the case at bar, could have been told the ruling of the *nisi prius* court could not be examined because it alone had the power to fix rules of evidence, pleading, and construction, what would the jurisdiction of that Court be worth? Let the State Courts propound what rules they will for the trial of issues as to matters purely of State cognizance, but when the issue is as to a matter of Federal cognizance, they must apply the principles of the common law—of general jurisprudence, and they must apply them rightly.

It would be wrong in us not to remark, and vain to deny, that the decisions of this Court have been very inconsistent as to how far, and in regard to what matter, it will follow State rulings. But we believe the authorities will sustain us when we say they have finally come to the position we take.

Jackson v. *Chew*, (12 *Wheaton*, 167) laid it down, it is true, that the State Courts would be followed in *other* matters besides construction of State statutes. It cites a case where a ruling by a State Court on the doctrine of *estoppel* was examined to see if it was in point, its control being conceded if it was. It cites another case, where the construction of the word *heirs* in a will, was followed as controlling.

But *Jackson* v. *Chew*, was overruled by *Swift* v. *Tyson*, (16 *Peters*, 18). That case holds that the 34th Section of the Judiciary Act of 1789, applies solely to statutes, and the construction of them. The Court intended to overrule *Jackson* v. *Chew*. (*See Story's opinion at page* 477). McKinley, J., in his dissenting opinion so understood.

Swift v. *Tyson*, was approved in *Lane* v. *Vick*, *et al.*, (3 *Howard*, 476). There the Court refused to accept a construction of Vick's will, repeatedly made by the State Court.

Foxcroft v. *Mallett* (4 *Howard*, 379), again approved *Swift* v. *Tyson*, and extended it, or at least declared a new application of its doctrine. It is there said that State decisions should not be held conclusive on the mere construction of instruments (deeds), or as to matters and language belonging to the common law, and not to any local statute.

Homer v. *Brown*, (16 *How.* 354), is to the same effect.

Certainly, the law of evidence at the time the case at bar was tried at *nisi prius*, was the common law. There had then been no legislation in California as to the law of evidence, and the common law was there. As the Court has declared, it has a right to expound the common law as well as the State Courts, so it has asserted its right to expound the principles of equity. Suppose, then, the plaintiff here had been seeking to establish a right to this land in a Court of Equity, and being met by the plea of the statute, was told she was barred, because she did not make out her title to this privileged land, according to the principles of equity, could not the ruling be examined?

When decisions of a highest State Court have been in conflict with each other on matters of State cognizance, it has been repeatedly held that the last one is not necessarily the controlling one. (*Pease* v. *Peck*, 18 *How.* 599; *Bank* v. *Knoop*, 16 *How.* 369.) In *Leffingwell* v. *Warren*, *ut su pra*, it is said the latest decisions will be followed, but it is there said, also, that they must be *settled* decisions. Whence comes this "quantity of choice," if the State Courts are to be implicity followed?

How is a Federal Court to rule on a question never passed on by a Court of the State when it arises, if it have no power to expound the law on all subjects not expressly regulated by State statutes? If the Federal Courts possess the power, they must exercise it concurrently with the State Courts in cases first tried in the Circuit Courts, and

revisorily in cases brought here on appeal, or by writ of error from the State Courts.

It is not denied that if the plaintiff had a right, as she claimed she had, based on the Act of Congress, or on the Act passed by the Legislature of California in pursuance of that Act, and the right was improperly denied upon a construction of either Act, the judgment may be reversed.

Murdock vs. The City of Memphis is not at all against us. That case merely adhers to the position held by the Court before the passage of the substitute for the 25th section of the judiciary Act, and will not assume to review the whole *case* any more than it would before; *but it leaves all that has heretofore been determined as to how far it will be controlled by novel constructions of State statutes, and by heresies as to matters of common law and general jurisprudence undisturbed.*

Assuming that the Court will examine all the questions in the case at bar, we proceed to discuss them still further and more directly and in detail, respectfully leaving it to the Court to determine what errors, if there are any, it will correct.

I.

Did the plaintiff make out a prima facie case?

The defendants say the possession of the intestate was not substantial, and was temporary and interrupted. This is not justified by the record.

The only witnessess who testify as to this are Cook and Sheridan.

Neither of them say one syllable to authorize even the suggestion that the occupation was only temporary, and only occasional. On the contrary they prove a continuous possession from previous to July or August, 1854, to a time as late certainly as April or May, 1861. Cook fixes its beginning previous to July or August, 1854; (*Transcript fol.* 31,) and shows McManus was there in September, 1860; (*Transcript fol.* 34.) Sheridan proves McManus resided on the land until his death; (*Transcript fol.* 38.) Neither Cook nor Sheridan say anything to show a disturbance of the possession of McManus's estate after his death prior to April or May, 1861. At that time Cook says Buckley told him he had taken up the land; (*Transcript fol.* 34,) and there is good reason to think Cook even mistakes the year 1861 in that statement for 1862; because Sheridan says Buckley took possession after the flood of the Sacramento River in 1862; *Transcript fol.* 39.) It is true Sheridan adds, that it was in August, 1861; but it is historical that the particular flood he must have alluded to, occurred in the winter of 1861-62.

Even if Sheridan had not said that McManus resided on the land until his death, the fact he did would be presumed; a *status* established is a *status* continued, unless the contrary appears.

Defendants' counsel say also that McManus' enclosure was not substantial within the decisions of this Court.

To this we have to say that even if the enclosure was not substantial, it makes no difference, provided it marked the boundaries of his tract, in view of the

fact he resided upon it. The necesssity for a substantial enclosure only exists where the land is held merely by an enclosure.

But the evidence shows a substantial enclosure. The Court below found no fault with it. Part of it on the southeast line of the tract, running between McManus and Crochet, was made of posts with two by three inch rails with brush underneath. (*Cook. Transcript fol.* 32.) The rest of the fence no the southeast line was brush, but it was a good fence when first built, and would turn cattle. That it withered down after awhile so that cattle would break through is nothing; all fences are liable to get out of repair; *Cook—Transcript fol.* 33.) And Sheridan tells us that he kept the fences in order for years prior to and up to McManus' death, and kept them up from cattle going through.

The north line of fence was made of posts driven down, and bush interwoven, and Cook includes in his statement, that all the fences were in good order while he lived near by—from 1854 to 1858. He says also the west line of fence was a two-board fence.

Trans. folio 32.

He says besides, it is true, that some of the fences were broken down when he returned in 1860, after two year's absence in Alameda, but he does not state how long they were down, and Sheridan says he kept them in repair.

Sheridan says there were two three-rail fences and one wooden fence; that the brush fence was perfectly good, and that he kept all the fences in order.

Trans. folios, 37, 38.

From the testimony of the two, Cook and Sheridan, it is apparent the enclosure was complete, and as substantial "as any prudent farmer erects to protect his growing crops." The intestate used the land in other respects beside residing on it. How entirely sufficient the possession was, will appear by contrasting it with the possession proved in the following cases cited in this reference, by defendant's counsel.

In Borel vs. Rollins, 30 Cal. 408,

the fence was of posts, with two rails for pickets, but no pickets, not sufficient to keep out small cattle, nor the land otherwise occupied. The plaintiffs did not reside upon it.

In Polack vs. McGrath, 32 Cal. 17,

there was no occupation of the land but only a fence with two rails,—no use of the lands, no residence upon it.

In Page vs. O'Brien, 36 Cal. 560,

where the plaintiff enclosed the land and put stock on it and still was held not to have thereby acquired possession, he did not so acquire it *because the defendant, at the time plaintiff enclosed the land, was residing on it*. In that case it is to be remarked, that the defendant did not have a fence around the tract—so complete a subjection to dominion is it to reside upon the land. The intestate here resided on the land, and had actual, solid, substantial and useful possession of it, under claim of right begun in 1853, and continued until his death in 1861, and afterwards until the entry of the defendants.

II.

The Statute of Limitations did not run at all.

At the threshold it is proper to remark that the cases decided by the Supreme Court of California relatively to the class of lands to which the land sued for belongs, as affected by the questions involved in the case at bar, are not of authority, beyond what their reasoning commands, as they are all now under examination for the first time by the tribunal, which is supreme in the matters treated by them.

The plaintiff's position as already seen, is this: possession is evidence of title. Title is true title. True title being of Hispano-American origin, and so proved by the plaintiff, her action is within the saving clause of the Statute of Limitarions, and not barred.

To this defendants say that presumptions are made only in the absence of facts, and not in the presence of facts, and that plaintiff silenced the presumption she had the city's title, by making proof that the title was in the city at the time of trial. This might be argued with a show of plausibility—if it were the fact the plaintiff proved title in the city. But it is not the fact. It is an assumption. The same assumption is made by the State Court in its last opinion in this case. We pointed out this assumption by that Court in our opening brief, and the defendants have not shown, as the Court did not, any authority for making it. The disclosure of the record is simply that the land was land confirmed to the city.

That fact did not concede, or commit the plaintiff to the implication, the land still belonged to the city. The city may well have conveyed it to the intestate long before the confirmation. And if proof the land had been confirmed to the city did imply the land was still the city's, *non constat* but it had passed a right of possession to the intestate, by some license or other competent assurance. It is an egregious mistake, if not a disingenuous assumption, to say the plaintiff admitted the title to be outstanding.

But if proof the land had been confirmed to the city, showed the title was still in the city, and if the State Court might take judicial notice, the city never gave any express license to occupy the *outside lands* (as the class here involved are called), it did not even then follow that the plaintiff did not claim under the city title. It is well known, and is a matter of judicial notice, that the City of San Francisco, with the approval of the State, and of the United States, has pursued the uniform policy of holding her ungranted lands open to actual occupation, and inviting it, and has in all cases, with like approval of both governments, eventually given them to persons availing themselves of the invitation. Such persons have always held such lands by something more than sufferance. Sufferance of the paramount Lord would be enough to constitute the occupant his representative, and the policy mentioned made him a conventional tenant.

If the defendants' assumption that proof of confirmation of the land to the city showed outstanding title in the city were sound, it would prove too much

— it would defeat the plaintiff without recourse to the Statute of Limitations. But that effect, we know, does not follow from such proof. In *Morton vs. Folger*, (15 *Cal.*, 275,) the plaintiff proved prior possession and confirmation of the land to Sutter, but did not deraign by paper title from Sutter, and judgment was demanded by defendant because the plaintiff had shown title outstanding in Sutter, or his grantees. The Court refused, and gave the plaintiff judgment avowedly on the ground of his prior possession.

There is no authority for saying, as the defendants do, that the plaintiff must *deraign* title, in the sense of exhibiting title papers. The statute exempts a plaintiff from the bar, who sues for land claimed under a Spanish or Mexican grant not five years patented.

The language in the cases cited by defendants to show a plaintiff must deraign by paper title to get the benefit of the exemption, was not used, *ex industria*. See those cases. *Vassault vs. Seitz*, (31 *Cal.*, 230.) *Richardson vs. Williamson*, (24 *Cal.*, 289.) *Anderson vs. Fiske*, (35 *Cal.*, 622.) and *Arrington vs. Liscom*, (34 *Cal.*, 389–390.)

But the question had been settled by an authority already cited. *Hubbard vs. Barry*, 21 *Cal.*, 324.)

A question identical with the one raised on this point, agitated the state of Tennessee for a great many years. It was disposed of on the principle of the law of evidence we claim should be applied here.

The question arose on the statute of limitations of Tennessee of 1797. That act required that

adverse possession to bar should be "*had by virtue of a grant or deed of conveyance founded upon a grant.*"

In many cases, the occupant entering under a deed, could not produce any evidence it was founded on a grant, and it was contended that he must fail to get the benefit of the bar, as it is contended here the plaintiff failed to get the benefit of the *proviso* of the statute exempting or from the bar. It was settled that if the occupant "*prove an adverse possession of seven years, under a deed before suit is brought and show that the land has been granted, he brings himself within the statutes.*"

Green vs. Lessee of Neal, 6 *Peters*, (*U. S. R.*) 295. *Gray et al vs. Darby's Lessee*, *I. Martin and Yerger*, 413.

In these cases, the presumption arising from possession carried the occupant *per saltum* over the chasm in his title, and dispensed with a continuous chain of paper titles. Here, we claim, possession should do the same for the plaintiff.

The authority of these cases is conclusive of the case at bar. According to them, the plaintiff made out a presumptive title to the land sued for under a Spanish grant, confirmed on the 18th of May, 1865, less than three years before suit was brought, and the defendants offered nothing in defense, but the statute of limitations, which did not bar the plaintiff, because she brought herself within the proviso of the statute of limitations, known as the Spanish proviso.

The defendants next say there can be no presumption against the Sovereign, and hence none to benefit the plaintiff.

The remark evidently proceeds upon a misconception. The presumption contended for is not against the sovereign in any logical sence. It is in favor of the sovereign, or, what is the same thing, it is in support or assertion of his title. The law always raises it against every attacking party, other than the Government. Whether the Government, in an action to recover land, would have to do more than prove it had never been severed from the public domain, is a question apart, and from the consideration of which no light is to be gained in this inquiry.

The defendants say, the plaintiff asserts the presumption of a grant. This is right. The plaintiff does. She asserts a grant of such character, whatever it need be, as will give to the right of possession she has by occupation, the quality of true ownership, and so of Mexican title, and so immunity from the Statute of Limitations for five years after confirmation. She stands upon a class of cases which have never been questioned, and of which *Hubbard* vs. *Barry* (21. *Cal.* 324), cited in her opening brief, is the leading one in California. The defendants, in this connection—saying plaintiff asserts presumption of a grant, again argue that the presumption ceased as soon as it appeared the land was granted on the 8th of March, 1866. But this is not so. The fact the land was granted by virtue of the Act of March, 1866, does not prove the land had never been granted before. The learned counsel ignore the fact it has been solemnly adjudicated, by Field, J., that the Pueblo of San Francisco, as such, had a Legislative grant of four leagues of

land, inclusive of the premises, and as it has to be taken to the four winds, was separated from other lands by an east and west line. But if there had never been any grant by the former or the present sovereign, it would make no difference. The presumption is not accurately defined when it is said that it is evidence of a grant from the sovereign ; it should rather be said that possession is *prima facie* evidence of a grant from the *owner*, whoever he may be, to the party in possession. The terms in which the rule is always announced are, *prior possession is prima facie evidence of title*, and the declaration of judges that they will presume a grant from the sovereign to make the fact of possession good as evidence of title, has been made to show how far the rule goes.

The defendants next say there can be no presumption of a conveyance or of a grant when the possession upon which it is invoked is consistent with the fact there was no conveyance or grant.

The defendants do not explain what they mean by this.

The record does not show the intestate had no grant or conveyance.

Of course it is possible a man may be in possession of land without license or deed from the owner, and of course any one having the mission to show the fact may rebut the presumption arising therefrom that he has license or deed, but how the proposition would have enabled these defendants, who are trespassers, to deprive the plaintiff of the benefit of the presumption in her favor is not apparent.

The proposition quoted, in defendant's brief, from Hermann on Estoppel (p. 500, sec. 526), that a grant will not be presumed when the original enjoyment is consistent with the fact of there having been no grant, does not advance the defendant's argument. *There is no evidence whatever how the intestate's possession began.* In the cases of *Jackson v. Mancius*, (2 Wend. 357), and *Fenwick v. Reed* (5 *B.* & *Ald.*, 237), cited by Hermann, in support of his text, it appeared distinctly in evidence how the parties had originally held. In the case from Wendell, the defendant went into possession under a deed in fee by a tenant for life (by the curtesy ;) in the English case the defendant invoking the presumption had entered under a judgment against the plaintiff's grantor. In neither of the cases was the defendant a trespasser, but in both connected himself with the opponent's presumed grantor. *Watkins* v. *Peck* (13 *N. H.*, 377), cited by defendants, relative to this presumption, amounts merely to saying a Court shall not stultify itself by presuming against fact. There it was in evidence the parties from whom the Court was asked to presume a grant were minors, and incapable of making a grant during the period then in question.

The corollary, deduced by defendants from the citation from Cruise's Digest (*Title XXXI, Chap.* 1, *Sec.* 2), that when, for reasons legally apparent to the Court, the possession from which presumption of a grant is invoked, could not have begun in a gtrant, he presumption will not be made, has no application.

Defendants say possession alone, short of the limitation, will not raise a presumption of a grant, and cite authorities. It is enough to say the record here shows that McManus was in possession from 1853 to 1861.

The defendants next say abandonment is to be presumed against the intestate Estate.

Abandonment cannot be presumed against the intestate himself, for he died in possession, and it cannot be presumed against his Estate before an administrator was appointed; not even *Tynan* v. *Walker* (35 *Cal.*, 635) goes that far. The appointment of an administrator, in special reference to this property, and plaintiff's visit to the United States to reclaim her inheritance—a valuable estate at the time of her brother's death, showed there was an intention not to abandon. (Trans. fol. 35.) So the plaintiff's womanly appeal to the defendant Donahue shows. (Trans. fol. 35.) Abandonment cannot occur when there is no one to intend it. Abandonment is the result only of actual intention.

The defendants further say in this connection that only immemorial usage will raise a presumption of a grant, and then only to supply the loss of a grant, which they again assume had never existed here. They cite for this the respectable authority of Cruise's Digest. (*Title XXXI, chap.* 1, *sec.* 12).

Without examining the text of Cruise we oppose to it the case of *Hubbard vs. Barry* (*ut supra*), where the Court assert the presumption in no such timid and precatory way, but generally, leaving it to stand on the bold and philosophical ground that one in possession shall be deemed to have every

right necessary to his protection until the contrary is shown *by some one having the mission to show it—by some one other than a trespasser.*

But, as already remarked, it is not a grant severing the land from the public domain, the exigency of plaintiff's case demands, but only the presumption of privity between the intestate and the City of San Francisco — the presumption that the intestate, as he was in possession of the land claimed to have been granted to the City by Spain, was so by deed, or license, or invitation, or even sufferance of the City.

The defendants further say in this connection, that every presumption of a grant is founded upon the acquiescence of the parties from whom alone the grant could come, and that the sovereign can not be deprived of title by acquiescence, and cite Cruise again. (*Title XXXI chap.* 1, *sec* 3).

This is but another form of asserting that prescription will not run against the King. It is the other rule that the King can be guilty of no laches. Understood otherwise it is absurd, if we may say so without offense. The corollary deduced by the defendants from the proposition seems, also, to involve an absurdity. They say a grant can only be presumed against parties acquiescing in the possession established, and that no grant can be presumed against a sovereign, because he can not acquiesce; and yet it is conceded that grants from the Government are constantly presumed. Whenever they are presumed they are presumed as much *against* the sovereign as the deed or license of the city is presumed against the City here.

But the remark that a grant will not be presumed against a sovereign from acquiescence is irrelevant. As we have remarked, it is a mere license from the City, which is to be supplied to the plaintiff. The *City* always had a grant from the sovereign. And the City acquiesced in the intestate's possession.

In conclusion of their discussion of this point, the defendants repeat that presumption of a grant can not be invoked by virtue of a possession short of the limitation-period.

This proposition does not hurt the plaintiff, as presumption of a deed or license from the City, we repeat, is all the plaintiff wants.

The proposition advances the plaintiff's argument. The record shows the intestate was in possession more than five years — the limitation period — before defendant entered. If possession of such length will raise a presumption of a grant from the sovereign, *a fortiori* it will raise the presumption of a license from the grantee of the sovereign.

III.

The statute did not run till there was some one to bring suit.

Suit was commenced within five years next after the appointment of the first representative who could sue. (Trans. fols. 15, 39.)

Until the cause of action has vested in some one, the Statute does not begin to run.

Smith v. *Hall, et al.*, 19 *Cal.* 85.

In *Smith* v. *Hall et al.*, it was held the Statute did not run, because there was no administrator to

bring suit against. The cause of action was a note which had fallen due after the death of the maker.

In *Grattan* v. *Wiggins* (23 *Cal.* 28), it is said there is a distinction between the non existence of a person to bring a suit and the non-existence of a person to be sued, and that where there is no person who can be sued, the statute will not run, but that it will run, whether there is any one to bring the suit or not.

The remark is purely *obiter*, and the Court acknowledges it is so in the opinion.

There is no such distinction. None such can be made without overthrowing the rule as to the case where there is no one who can be sued. This will be apparent when we come to state the grounds of the rule, as we will have occasion to do.

Tynan v. *Walker* (35 Cal. 635), cited against us, expressly declares that the statute runs, whether there is any one to bring a suit or not.

Tynan v. *Walker*, is not authority on the question. What it says on the point is *obiter dictum.*

The question was not in the case.

The case showed a tenant seeking to bar the estate of his deceased landlord, when he had never surrendered the possession, or in any way notified his landlord's legal representatives that he repudiated the tenancy.

This is *all* the case.

It is true the tenant, six months after the death of the landlord, and more than five years before letters of administration were granted on his estate, and consequently five years before suit was brought, filed an affidavit in the County Recorder's office,

claiming the land under the State Possessory Act, but no notice of it was given to the landlord's heirs or representatives, and the law affected them with no notice of it.

The Court below should have instructed the jury in that case, that the defendant had not shown an adverse possession, and the appellate Court should have approved the instruction.

But *Tynan v. Walker* is not only an *obiter dictum;* it is not law. The opinion is labored and, does not sustain itself.

The rule it attacks is recognized in England, Connecticut, Virginia, Maryland, North Carolina, New York, Missouri, Mississippi, Pennsylvania, Kentucky, California, by the Supreme Court of the United States, and so far as we can learn by diligent search, has never been denied anywhere.

In England it was firmly established in 1812, on the authority of cases decided as early as 1603, and has never been disturbed.

Murray v. The East India Co., 5 *Barnwell & Ald*, 204, 6 Bac. Ab. 393, and cases there cited. *Burdick v. Garrick*, 5 *L. R. C. A. Cas.* 233.

CONNECTICUT.

Sturges v. Sherwood, 15 Conn. 149.

VIRGINIA.

Hansford v. Elliott, 9 Leigh. 97.

MARYLAND.

Ruff's Administrator v. Bull, 7 Harr & Johnson, 14.

NORTH CAROLINA.

Grubb's Administrator v. Clayton's Executor, 2 Hayward, 378.

NEW YORK.

Wenham v. Mohawk Insurance Co., 13 Wendell, 267 ; *Bucklin v. Ford*, 5 Barb. 395 ; and many later cases.

MISSOURI.

McNair v. Dodge, 7 Mo. 404.

MISSISSIPPI.

Geiger v. Brown, 4 McCord, 423.

PENNSYLVANIA.

Levering v. Rittenhouse, 4 Wharton, 130; 8 Watts, 44.

KENTUCKY.

Beauchamp v. Mudd, 2 Bibb. 537 ; *Commonwealth v. McGowan*, 4 Bibb. 62.

CALIFORNIA.

Smith v. Hall, & *al.*, 19 Cal. 85.

UNITED STATES.

Richards v. The Maryland Insurance Co., 8 Cranch, 92.

In Louisiana this rule prevails. It is there derived from a maxim of the civil law, which, we suppose, is recognized over the civil-law countries of Europe, *contra non valentem agere non currit prescriptio.*

Hernandez v. *Martin*, 7, *Martin*, 216; *Morgan* v. *Robinson*, 12 *Martin*, 76; *S. C.* 12, *Wheaton* 136.

Standard text-book writers adopt the rule as elementary law.

Angell on Limit, &c, 14.

Darby & Bosanquet, Limit., p. 31., *and cases there cited in notes.*

In *Smith* v. *Hall, et al.* (*ut supra*), Baldwin, J. (Field, C. J. and Cope, J., concurring,) places the on rule the ground of accepted authority.

The authorities, all of them, place the rule on the ground the two cases it governs *are not within the words of the Statute.*

The words of the statute of California are: *civil actions can only be commenced withiu the periods prescribed in this Act after the cause of action shall have accrued.*

(*Act April* 21, 1850, *Sec.* 1).

These words—*cause of action* and *accrued*, are used, one or both, in all Statutes of Limitation, since 21. James I. (1673).

They were employed in the Statute of Fines, of 4, Henry VII. (1487.)

The authorities all say, that a cause of action cannot accrue unless it accrues to and against somebody; that there cannot be a cause of action without an actor and a defendant.

This rests upon the plain meaning of the words.

Accruing is accession—accretion—the addition or growing of some thing to some body—of some right or benefit to some person.

The etymology of the word *accrue* is neither obscure nor doubtful, and, unless figuratively, it is never used in any other intention than the one given.

These words have become sacramental—the ex-

pression a formula; they recognize a distinction between a cause of action and a right, and as new States are added they are adopted by their Legislatures with the accepted exposition attached to them by what has long since become jurisprudence.

It is true some of the judges, in recognizing the rule, have said they could not intend that the Legislature had any such thing in their mind as creating a bar where there was no one to sue or be sued; but the remark has never been properly made except as corroborative of the import of the words of the Statute.

The Supreme Court of California, however, denounces the literally time-honored exposition of the words of the statute—a simple verbal definition, as a judicial dogma, and attack the rule founded upon it with intemperate fury.

Examine the opinion, proposition by proposition.

It is first charged that the rule is not consistent with the judicial interpretation given to another part of the statute—that as the statute once started will not be stopped by death, so death (or the non-existence of one to bring suit) ought not to keep it from starting. The opinion proceeds to argue that if the statute does not run in one case where there is no actor or defendant, it ought not, by parity of reason, in another. But it is not a matter of construction. The rule, that the statute once started will not stop, is not the result of judicial interpretation; it is the letter of the law. The law provides that when a cause of action accrues to one against another (both being *in esse* and each

sui juris) the statute shall begin to run, and *does not provide that anything shall stop it.*

The Court, in *Tynan* v. *Walker*, next say that the rule found no foundation in the terms of the statute, but was based on the inherent equity of the 4th section of the English statute.

This is not the effect of the modern cases. They rest it on the meaning of the words *accrued, descended, cause of action* and cognate words.

The leading English case, *Murray* v. *East India Co.* rests on the word *accrued.*

The Court say again that the rule in England proceeded on the theory, the case of *no one to sue* was within the reason of the exceptions, and that Parliament could not have intended the statute to run in such a case. Such is not the later theory.

This Court may well refuse to follow the case of *Tynan vs. Walker.* It is a single case. The Supreme Court of California ought to, over-rule it. They were not invited to do so through inadvertence in this case. This Court is as free to overrule it as the California State Court.

It ought not to be followed. No matter how ingenious, or, to speak of it with the entire respect due the learned jurist who wrote it, no matter how well reasoned it may seem to be, it overthrows a rule too deeply seated in considerations of justice, and too long and universally established to be disturbed.

The argument that the statutes of limitation do not save unrepresented rights, because they do not expressly save them, as they do those of persons under disability, overlooks, not only the plain

words of the statutes, but, also, the historical fact that until recently Legislatures have been careful to respect, and treat as sacramental the forms of the great statutes which modern policy has enacted to supplement the Common law, such as the statutes of Fraud and of Limitations. It overlooks the undoubted fact that Legislatures have generally been content to re-enact the statute of Limitations as originally framed, leaving it to have the effect judges had allowed it. The statute, as originally framed, expressly saved rights of persons under disability, as the modern statutes do, and yet the exemption of unrepresented rights was always declared to be the direct effect of the words of the statute. It is too late — it will not do — it is an innovation—a removal of land-marks, to use against a settled rule an obvious argument which was rejected when the rule was established, and has been universally rejected ever since.

Demarest vs. Wynkoop, (3 *Johns, Ch.*, 138,) cited by *Tynan vs. Walker*, is merely to the point that cumulative or successive disabilities are not within the policy or sound construction of the statute of limitations. Chancellor Kent there holds the language quoted by the Court in *Tynan vs. Walker*, but that language produced no effect on the jurisprudence of New York, in regard to the point ruled upon in the latter case. Kent's opinion was delivered in 1817, and we find the rule, that the statute does not run until the grant of administration, broadly laid down, though not decided, in *Wenham vs. Mohawk Ins. Co.*, (13 *Wendell*, 269;) and sharply so decided in *Bucklin vs. Ford*, (5 *Barb.*, 395,) and other cases cited *ante*,

The remarks quoted from the opinion of Marsall in *McIvan vs. Ragan*, (2 *Wheat.*, 25,) are *obiter*, and were not applicable to the question. There the supposed impediment was not in the way of bringing a suit, but of getting at the evidence. The attempt was made to imply an exception not created by the statute.

Beckford vs. Wade, (17 *Vesey, Jr.*, 87,) is also cited by *Tynau vs. Walker*. The reasoning of that case does not militate against the rule that there must be some one to sue before the statute runs. There the cause of action had *accrued*, but the defendant was beyond sea, and the statute of Jamaica, which was in question, did not provide it should not run against absentees. Absentees may sue and be sued, as well as those at home. If they were to be exempted, an express exception was necessary. Here we do not "take sanctuary in any exception." We say we are not within the words of the section creating the bar. We say no cause of action accrued until the appointment of the legal representative.

None of the cases cited by the Court in *Tynan vs. Walker*, nor the case of *Demarast vs. Wynkoop*, *ut supra*, affected the rule under examination, or prevented the clear assertion of it by Abbott in *Murray vs. East India Co., ut supra.*) In all these cases there were attempts to create new exceptions by implication. The rule asserted here, we repeat, rests upon the plain meaning of the words.

Tynan vs. Walker overrules *Smith vs. Hall et al, Administrator, etc., ut supra*, which held that a suit on a note not due until after makers death, instituted nearly seven years after grant of administra-

tion, was not barred by the four year's statute. Mr. Justice Baldwin delivered the opinion ; concurring, Field and Cope J. J. The case of *Smith vs, Hall et al*, was brought to the attention of the Court by printed brief, in *Tynan vs. Walker*, but they do not even notice it in their opinion.

Strange this rule should have been so long tolerated without shock to the logical sense of the jurists of the great commonwealths named, so long survived the conclusion that limitation is repose, and yet cannot be tolerated by the California Court, but must be struck down after eighteen years of immunity in California by the judicial hand and not by the Legislature, so as to alter rights of property, and to the especial detriment of a class of persons either helpless or deprived of the right to help themselves. *Festina lente*, is a maxim not to be overlooked in *judicial* reforms of the law. *Stare decisis* is its judicial equivalent. The Court not governed by it is an iconoclast and an innovator.

The Court in *Tynan vs. Walker*, profess to rule as they do, in obedience to the expressed will of the Legislature, but there is nothing new in the Act to indicate the Legislature intended to alter the rule as expressed by the formula used as a statute of limitation everywhere else.

The Court say in *Tynan v. Walker* that what they acknowledge has been the time-honored reading of the statute of limitations, is a violation of the rule requiring statutes to be read as they are written, and account for this judicial sin, so long accepted by Legislatures, on the ground that Courts so long hated statutes of limitation. We have shown it is the

plain reading of the statute. They add that as those statutes are now regarded as statutes of repose, the rules restricting their operation should fall to the ground. If this were desirable, the Legislature ought to do it. Changes made by Courts unfortunately are necessarily retrospective, and parties wake up to find that by some decision overuling accepted doctrine, rights till then assured, are gone.

But the abrogation of the rule requiring the existence of an actor before time shall run against right, is not desirable. The procedure of courts in California allows every one to sue to quiet title, whether in possession or out, and to procure the appointment of a representative for any unrepresented claim. Much as repose is desirable, it may be purchased at too dear a rate by attacking unrepresented rights. To do so is to give a premium to the laches of parties seeking the benefit of the Statute of Limitation.

IV.

The defendant's possession was not adverse?

The defendants say in support of their possession, that the circumstance they did not claim the land at all, but recognized it was the city's all the time,—as they swear in their answers they did, and as it appears from the admission they offer they did, does not make their possession any the less an adverse possession; that the circumstance they did not hold adversely to the city, does not prevent their possession from satisfying a statute requiring holders to have entered under claim of title exclusive of

every other title. They say "there is in California a relative or qualified adverse possession."

The expression belongs to Sanderson J., in *Kimball v. Lohmas*, (31 Cal. 154). It is not happy. Indeed it begs the question it was intended to settle. It is in the teeth of the text of the statute. The possession called for by the statute is, as we have seen, one begun and asserted under a claim of title exclusive of every other right—is in other words as *un*qualified and absolute as the possession of the very owner himself.

The California cases cited do not support the State Court in the doctrine they lay down in the case at bar.

The defendants do not show five years possession, accompanied with claim of title against all the world, or with intention to make title by prescription against all the world. On the contrary they prove affirmatively they did not hold adversely to the City of San Francisco, and they insist the City had the title.

By such a possession they cannot prescribe. Prescription of its nature is universal. Necessarily it must exclude the right of the true owner.

If they cannot prescribe they cannot bar. Limitation is prescription, and what is not prescription is not limitation. This rule is enunciated in *Le Roy* vs. *Rogers*, (30 Cal. 235,) and in *Grattan* vs. *Wiggins*, (23 Cal. 36,) and finally established in *Arrington* vs. *Liscom*, (34 Col. 365.)

The doctrine has become so thoroughly a part of the jurisprudence of the State that it cannot be disturbed. Of course no one will venture to say de-

fendants acquire title by the possession they set up as a bar here. They did not pretend to hold the City at arm's length, but recognized her title. They could not bar the City by such a possession. Five years' mere possession is not enough. Here plaintiff admits a possession that long, but does not admit it was adverse, and defendants show it was not. The case is the same as *Sharp* vs. *Daugney*, (33 Cal. 505.)

As there is no limitation without prescription, every title must be extinguished at least which can be. The City title can be extinguished by limitation. It has been so held.

McCracken vs. *The City*, 16 Cal. 636.
The City, &c. vs. *Fulda*, 37 Cal. 349.
San Francisco vs. *Calderwood*, 31 Cal. 585.
Platt Evans vs. *City of Cincinatti* and *Cincinatti* vs. *Fisrt Presbyterian Chucrh, ut supra.*

It makes no difference in this view whether the City had the title in fact or not The fact defendants did not claim against the City shows they did not claim the entire title. To prescribe is to get the entire title. We know by the record the sovereign had parted with the title before the suit was brought. No one is barred as long as defendants did not claim against all the world, for without such claim they cannot pretend to hold with intent to make title. If the proof had been that defendants did not pretend to hold against the City of Sacramento or San Jose, (assuming either City could hold land *in San Francisco*,) or against any natural person, with title or without title, they could not have pretended to make title.

The point is: here are defendants setting up adverse possession, when they admit they never intended to affect such rights as a certain corporation or individual (for it is all the same) may have had; when they admit they never held against rights they themselves claimed to exist, no matter whether they did exist or not; when they admit, in short, that they never held *animo domini* at all.

It has never been held, in any reported case brought to our attention, that when title is outstanding in a city, prescription can run in favor of a party who recognizes that title. That defendants did recognize that title appears from the evidence and from their answers, in which they aver title in the City, and set up such facts as would show it to be the paramount title. They so argue in their brief. (*Defendant's Brief*, *p.* 26.)

The Court below, in their opinion in the case at bar, remarked that in early cases the claim of title was not always against the world.

We respectfully maintain that it matters not what isolated cases may be, but that the statute of Limitations of the present day is universally understood to require that the party invoking it must unequivocally assert himself as at war with all the world, and that, above all, if he does not include the true owner in his defiance, he cannot bar any one.

Mr. Chief Justice Wallace, in his dissenting opinion in this case, holds that even the sovereign must be defied or no one is barred. He based this view upon *Arrington* v. *Liscom* (34 Cal. 365.) We think it is compulsory.

We understand it makes no difference whether it is the United States, any other political corporation, a civil corporation, or a natural person—if anywhere, or in any one there is admitted to exist outstanding a title superior to the occupaut's, he cannot prescribe, or bar. Nay more: if there be any one, with or without title, against whom the occupant acknowledges he does not hold, or seek to make title, he cannot prescribe. In such cases there is no adverse possession. In the words of Chief Justice Wallace in this case, "Adverse possession * * is made up, not only of the fact of possession, but of the *quo animo* with which that possession was taken or held" as well. If the occupant neither took or held with the intention of making title against the City and all the rest of the world, he never assumed to hold an adverse possession — he never undertook to get the benefit of the statute of Limitations for any purpose.

We say this view is compulsory. It is a necessary and inevitable corollary from the case of *Arrington* v. *Liscom*, *ut supra*.

That case, by inevitable implication, overruled *Page* v. *Fowler*, and that whole class of cognate cases. The contrary idea cannot be entertained a moment. How can one say he has acquired a title upon which he may be actor, as in *Arrimgton* v. *Liscom*, upon which he may maintain ejectment against the written title itself, when he has no pretension but a possession for five years, held all the time by the permission of the owner, and with recognition of the owner's rights? How could a person, in view of such facts, say he had acquired a title which he knew stood

where it could never be affected by adverse possession—in the United States, for example? How say he had the title against any one, when, as here, he knew the city had the title originally, and when he had never pretended to question or resist her title, but had always faithfully observed it? *Page* v. *Fowler*, and kindred cases, are overruled also by *Gibson* v. *Chouteau et al.*, *ut supra.*

If plaintiff is to be barred in this case, *Page* vs. *Fowler* is not only to be re-asserted—assuming it overruled—but is to be extended. Indeed, the opinion of the Court below, in the case at bar, holds that possession, permissive in all respects, at least one not accompanied by any claim of title, or intention to make title, will bar everybody—even the true owner. The effect of the opinion cannot stop short of this, if it is ever admitted adverse possession can exist without the *animus domini.*

The State Court should not disturb *Arrington* vs. *Liscom.*

It gives prescription. Certainly a more benign doctrine has never been declared. It is the necessary supplement of limitation, without which land acquired by limitation is kept out of market and cannot be realized. It enables the party entitled to its benefit to place the facts *in pais*, which constitute his title, at once upon the record. The Statute of Limitation, construed as involving it, becomes pre-eminently a statute of repose.

The doctrine of *Arrington* vs. *Liscom* is bottomed on the rock. The learned jurist, who spoke for the Court in that case (Sawyer), has been careful, out of his modesty, to support it by an array of

authorities so ample we have not thought it necessary to seek more. For convenience we transfer them to this brief.

Besides the principal case, *Arrington* vs. *Liscom*, *LeRoyvs* v. *Rogers*, 30 Cal. 234, and *Grattan* v. *Williams*, 23 Cal. 26, held that limitation is prescription.

So Angell on Limiiation, 1 sec. 1; *ibid p.* 367, sec. 2, 398, sec. 2.

So held in New York. *Jackson* v. *Oltz*, 8 *Wendell*, 440; *Jackson* v. *Duffendorff*, 3 *Johnson*, 269; *Jackson* v. *Roghtmeyer*,, 16 *Johns.*, 327.

So the Supreme Court of the United States, *Pendleton* v. *Alexander*, 8 *Cranch*, 462; *Bradsheet* v. *Huntington*, 5 *Peters*, 438; *Leffingwell* v. *Warren*, 2 *Black*, 605.

Dayton v. *Marshall*, 1 Rice's Eq., 384, 386.

So Lord Mansfield, *Taylor* v. *Horde*, 1 Burr, 119. So other English cases, *Stokes* v. *Berry*, 2 Salks. 421; *Barnish* v. *Thompson*, 7 Term R. 492; *Bickford* v. *Wade*, 17 Vesey, Jr. 87.

So in Pennsylvania, *Pederick* v. *Searle*, 5 S. & R. 239; *Moore* v. *Luce*, 29 Penn. 260.

So in Maine, *School District*, &c., v. *Benson*, 31 Maine, 384.

So in Ohio, *Thompson* v. *Green*, 4 O., 223.

So in Alabama, *Newcombe* v. *Leavitt*, 22, Ala. 631.

So in Georgia, *Thorn* v. *Lee*, 5 Geo. 217.

So in Kentucky, *Chiles* v. *Jones*, 4 Dana, 483.

But, assuming that the *Union Water Co.* v. *Crary*, and *Page* v. *Fowler*, and their congeners are unaffected by the later case of *Arrington* v. *Liscom*—assuming that a party who has never denied, but, on

the contrary, has always admitted title in the United States, may bar all the world but the United States, those cases do not apply where title is outstanding in a City. They are cited by the Court below, however, as direct authority to the point that *possession, to be a bar, need be adverse only to the particular party afterwards suing.*

This is not stated in the opinion of the Court below as precisely as we put it, but it is exactly what is intended. We only place it in bold relief. The Court say the question is, whether possession, to be a bar, must be adverse to all existing titles. Then they say it has been settled in California by direct authority, that it need not be, and cite the authorities.

But none of these cases support the position—none of them treat the outstanding title as a "false quantity," in the inquiry as to adverse possession, except when it is in the United States.

The Union Water Co. v. *Crary.* (25 Cal. 509,) which made five years' use of flowing water a bar, where the stream was on public land of the United States, rests evidently, though not avowedlo, upon the great necessity, the mining interest of the State should be placed on as solid ground as possible. And more, the title of the sovereign had been, in that case as in all mining cases, *quasi* extinguished by the settled policy of the United States, which had thrown the mines open to free and common use.

Besides, the point for which the case is cited is purely *obiter dictum.* The water there, being taken up at a certain point, could not have been diverted

above that point, even on private land; so that it was not necessary to bar the United States' title in the land occupied by the party setting up the plea.

Page v. *Fowler* offers no reason for the rule. The presumption is, however, that similar considerations governed the Court to those which operated in the *Union Water Co.* v. *Crary*.

Le Roy v. *Rogers*, *ut supra*, does not aid the argument for defendants; there the title barred was the entire title—a patent of the United States. *Vassault* v. *Seitz* is not an authority against plaintiff on this question at all. The only point in which it could be supposed applicable to her case, is, that there the Court would not exempt a plaintiff from the bar on the ground he claimed under a Mexican grant; but, though plaintiff here claims to be exempted from the bar, if it exists, for that reason, that case is not in point, because there it did not appear there actually was any Mexican grant, or that any proceedings were pending, or had been had for its confirmation. The Court could not judicially know those facts. It did appear there, that *plaintiff had an Alcalde grant of lana in the limits of the Pueblo*, but not that there was any Pueblo or Pueblo grant; so that what is there said about deducing title has no allusion to the mode of deducing title. This remark, however, is foreign to the topic we are now discussing.

Page v. *Fowler*, and its class of cases, as we remarked before, are an innovation—a new departure, at the best. They were, as we have suggested, deemed to be actually extorted from the Court by the peculiar wants of the State, in view of the fact

that much land was held here without extinction of the sovereign's title, or intention to extinguish it. Those facts offered some pretext for excusing the non-exclusion of the title of the United States by parties seeking benefit under the Statute of Limitations. The United States could not be barred. The City can be.

But the departure never went beyond the exception of the United States. It cannot be pursued further. The text of the Statute will not permit. There is no reason it should go beyond the City in the ground given as to the United States in this respect.

To extend the doctrine of *Page* v. *Fowler*, as is done here, to the point of viewing every title but that of the plaintiff as a "false quantity" in the controversy between him and the defendant he sues, is to disturb a rule of property. It is to overturn cases which have been looked upon as fixing the law. It is to entrap not the unwary, but the careful and discreet. It is to reverse cases counsel had in their eye in the trial of this particular cause; in view of which, nay, in secure reliance on which, the admission of five years possession was made in this cause. In point of fact, it was made as a simple and economical test of the rights of parties. It is evident the admission never would have been made but for reliance on the adjudged cases, because the record shows there was no claim to hold against McManus' estate at all. Whatever defendant's secret intentions may have been, they have furnished evidence themselves of facts which would have prevented their possession from ever being held adverse.

Donohue said he would give up his part of the land when she established her claim—which meant, when she proved her brother's possession, if it was not a cruel mockery—a thing not for him to say; and Buckley told Sheridan he would give up the land when anyone came for it. (*Trans. fol.* 58, 59, 65.) It was well known to counsel for plaintiff that the city could be barred. The case of *McCracken v. The City*, (16 *Cal.*, 591,) was well known to them. So, also, *The City and County v. Fulda*, (37 *Cal.*, 349.)

Those cases recognize that the city may be barred. It was well known to counsel for plaintiff that to bar one must so hold as to make title. They were familliar with *Arrington v. Liscom.* They relied on these cases. It is not to be said they mistook their just effect. They did not. But yet that effect is to operate as a false light—guided by which they have wrecked the plaintiff's bark. Connsel for plaintiff could not, for a moment, entertain the thought the Court would ever dream of recognizing possessions as adverse which were not exclusive of all the world. They considered those cases as of necessity defining a rule. If those cases were to be overturned, the least that could have been done would have been to order a new trial, and set aside the admission that the possession was adverse to anyone as against the fact, and improvidently made through a mistake of the effect of adjudged cases. Else the plaintiff was a victim—it may be of the improvidence of her own counsel, but, nevertheless, a victim when her counsel were in good faith relying

upon cases plainly written, and when she could not help herself.

The expressions used in all the California cases, in reference to adverse possession, are clear and definite. They admit of no exception from the category of *all the world.* They contemplate the occupant shall claim *the fee* against all comers—no matter whether owners or not. The very cases, *Union W. Co. v. Crary* and *Page v. Fowler*, which have caused all the trouble, require the occupant to claim against *all the world but the United States. McCracken v. The City*, (15 *Cal.*, 591,) says, "*the claim must be exclusive of every other right.*" The same case says: "*When parties assert by declaration, or conduct, the title to property to be in others, the statute cannot, of course, run in their favor. Their possession under such circumstances, is not adverse. Nieto v. Carpenter*, (21 *Cal.*, 455,) requires "*the intention to hold against the whole world.*" *Kimball v. Lohmas*, (31 *Cal.*, 154) requires, in case of entry without color of title, "*an intent to claim the fee against all comers.*" *Simon v. Eckstein*, (22 *Cal.*, 580) requires the claim to be "*against all the world.*"

At the common law, the party *must enter under color of title*, and to give him color of title, he must have had a deed purporting, "*in its terms, to transfer the title and such as would, in fact, have passed the title, had it been executed by the true owner * * * and the occupant must have entered in good faith, in the belief that he had a right to the premises, and with the intention to hold them against the whole world.*" (*Nieto v. Carpenter*, 21 *Cal.*, *pp.* 489, 490.

When one enters under a written conveyance, he is held to the same strictness here. (*McCracken v. The City, ut supra.*)

A party may enter here without color of title, and bar, but he must enter with "*intent to claim the fee against all comers.*" (*Kimball* v. *Lohmas, nt supra.*)

No commentary is needed on these expressions. They speak for themselves. Field J., defines them, when he says, *in McCracken* v. *The City, the claim must be exclusive of every other right.* They are expounded by the fact that at common law, the occupant must believe he had a title. What would be said of these defendants, if it should be found they entered under written instruments, purporting to convey the land, when they knew and admitted the city owned the land all the time? They could not make a pretension to bar any one.

And yet the defendants did so enter; they so allege in their plea of the bar. *They do not allege the bar of entry without color of title.* They allege they entered and claimed under deeds as owners, holding against all the world. The Judge below instructed the jury that the plea, so alleging that the defendants entered under written conveyances and held five years as owners, was proved by the plaintiff's mere admission, and no evidence other, that they held adversely against all the world, except the City of San Francisco, which the sworn answer averred facts to show was the true owner. (*Trans. fols.* 22, 23, 25*th plea; also, Trans. fols*, 25, 26, 8*th plea.*)

The kind of adverse possession thus set up must be proved as set up. It requires good faith and con-

fidence in their title. It was not proved by evidence, which showed they had no title, but recognized a superior. To so instruct the jury was error, to be corrected on this appeal.

The expression "*all the world*" is more fully expounded by *Arrington* v. *Liscom*. That case makes a bar a title. A bar may be necessary only against the casual assailant—a title must be good against the world. And if a bar must have the qualities of a title, it must be founded on a claim against the world.

The State Court invoke the rule observed in the District Courts, to fortify their position, that it is not necessary for one seeking the benefit of the Statute of Limitation, as to land in San Francisco, to hold against the city. With all deference, we think the suggestion disfigures the opinion. It was not for us, of course, to remind the Court that the jurisprudence of the District Court is not to govern in the Supreme Court, but it is to be remarked, that while the jurisprudence of the District Court ought not to be disturbed when it rests on authority, or, in its absence, on principle, and is well established, yet when founded in error its existence is a reason for its correction, not for its perpetuation.

The Court below in the close of their first opinion, enunciate a proposition, seemingly, by way of syllabus, or summing up of their views; they say that, where title has not been shown to have passed to a private person, a bar shall be none the less effective, because the party did not hold adversely to the government. This, we understand to be a mere repetition of the doctrine of *Page* v. *Fowler*, but not as going any

farther, as it is necessary to do for this case. Here the title has passed to a private person, that is to say, it has been severed from the sovereign; it has passed to a private person, so far as the United States are concerned, if not literally and actually. It passed to the city. But more, it passed, literally and actually, to private persons. It passed to the city, not as part of the government, either State or Federal, but in trust for private persons, to whom the legal title is to be transferred as soon as they identify themselves. It belongs to those persons, as of the date of possessions by which they acquired their right if, for any benefit to them, the fiction is necessary. It is the private property of certain *cestuis que trust*, and can no more be divested now than it can be when actually conveyed to them, in full property. Here, then, we have title outstanding in a private person. It makes no difference, under our system, if it would under any, in what shape the title is outstanding, whether in that of an equity or of a legal estate. Here, we have title outstanding in a private person, which must be dealt with, and the Court will not lay down a rule for it in this case; they say so in so many words, and yet, by subjecting the case to a rule which does not embrace it, they deprive the plaintiff of her estate.

The truth of this matter is, that the admission, not extending, as it does not, to the City, but expressly excepting her, as it does, does not concede defendants *held adversely to any one*, and they stand, at this moment, before this Court, defeating the plaintiff, who has showed title, by a possession, *which has been adverse to no one at all*, not even to those the

admission confesses it was adverse to. *For the whole world, or such persons as had any right in the land, held through the City;* the City was the trustee of the legal estate, holding it for the *cestuis que trust*, whoever they were, and the rights of the *cestuis que trust*, can not be barred without barring the trustee, unless the trustee does it. Here it is admitted the trustee is not barred, but, it is urged, has the title yet. The admission itself is, therefore, an absolute nullity. It is void for inconsistency. It shows, when considered in connection with title in the City and the legislation relative to City lands, the Court must judicially notice, that the possession it concedes, so far as it could be adverse, being only partial, was not adverse to the plaintiff.

This branch of the argument, that the City held this land as trustee for the plaintiff will be critically examined. We will, therefore, develop it, and, in so doing, we will attempt to show that it has still greater scope than we have given it—indeed, that it goes the length of establishing that the plaintiff has the title, and that it is of Spanish origin and has always been exempt from the bar, up to suit brought, at least.

The land was confirmed to the City in trust for the inhabitants, by the decree of the Circuit Court, as a grant from Spain. The title the City thus held, it is, by late decisions, definitively ascertained, was only an equity. The legal estate was then granted to the City by the U. S., in trust to be disposed of and conveyed to parties in the *bona fide* actual possession thereof, by themselves or tenants, on the 8th of March, 1866, in such quantities and

upon such terms and conditions as the Legislature of the State might prescribe. The Legislature of the State, on the 27th of March, 1868, conferred the title, beneficial, if not legal, on those persons who were in the *bona fide* actual possession on the 8th of March, 1866, or who were entitled to be, or who had got it afterwards, by legal process.

Now, if the plaintiff was not in the *bona fide* actual possession of the land on the 8th of March, 1866, and there is no difficulty, unless in the word *actual*, yet she was entitled to be, and *so* stood entitled to recover the land at the date of the Act of the Legislature disposing of the title.

The Legislature was competent to say a party ousted should so take. The grant by the U. S. did not purport in law to be absolute in its appointment of beneficiaries, because, so far as it could give power at all, it gave the City power to dispose of and convey the land, not only on such terms and conditions, but *in such quantities* as it saw fit—a power incompatible with absoluteness of the appointment of those who had the *possessio pedis* as beneficiaries by the Act of Congress. It is the manifest, the intention of Congress was not to give the land to a trespasser, but to give it to the true possessor, and to clothe the Legislature of the State with discretion to point out who he was and how he should be ascertained, that is to say, the trust was to be settled in its details by State, not national authority.

The Legislature having thus seen fit to create title in a class not specially mentioned by the Act of Congress, but pointed out by common justice,

and always recognized by the policy of the State before that, its Act operated by relation, as of the date of the intestate's possession, and clothed him with a title to land "*claimed under a Spanish grant.*"

If this is not so, one thing is certain: the title to this land was created by Congress in 1866—the legal title. Until that title was created, no right in that land could be the object of limitation. This is the effect of *Gibson* v. *Chouteau & als.* It is the rule of the arbiter, who is supreme as to these matters. There is no escape from it.

The cases cited by the defendants relative to the public lands, and relied on by the State Court, do not apply. In those cases the title was confessedly outstanding in the United States. They were decided professedly on account of a supposed necessity growing out of the large quantity of land in California, held by mere possession. The doctrine announced in them has never, until recently, and since this case was decided, been applied, where the land had been granted by the Spanish or Mexican Government, whether segregated or not. Those cases, moreover, are in the teeth of the statute. See how they struck Wallace, C. J., when his mind was fresh, and before he had been cajoled by his brother Justices' argument of necessity. (*Dissenting opinion. Appendix.*)

See how his logic chimes with the healthy and virile logic of Field, J., in *Adams v. Burke* (*Oregon C. C. Cases, August* 1875), with a logic healthy enough to read the Statute as it is written — especially when that statute is a formula which has been adopted and expounded in but one way for four centuries.

Bird v. Lisbros (9. Cal. 1), and *Connelly v. Cain* (16 Cal. 572) are cited by defendant, to show that when plaintiff relies on prior possession alone, five years, adverse possession will bar him.

Such is not the plaintiff's case. Something more is proved by her than prior possession. A fact is affirmatively proved *ex industria*, as a part of her case, which shows that the five years do not bar because the statute does not run. The plaintiff shows she sues on a Spanish grant, not confirmed long enough to be barred, and on a Legislative grant, not old enough to be barred.

Carleton v. *Townsend* (28. *Cal.*, 223) is cited by the defendants, but it is only to the point that a *defendant*, seeking to defend himself on the city's title against *prior possession*, must connect himself by express proof with the city.

Leffingwell v. Warren (2 *Black.*, 605); *Arrington v. Liscom* (34 Cal., 383); and *Cannon v. Stockman*, (56 Cal., 541), are cited by the defendants to show they have title by prescription.

It is enough to remark, that the defendants must bar in order to prescribe, and the difficulty of their case is that the statute never began to run for them at all.

Besides, it is idle to say they have prescribed when they all the time recognized and now claim the city has the title.

Arrington v. Liscom (34 Cal., 383) is cited by them. It is one of the strongest authorities we have that possession to be adverse must be exclusive. See what Wallace says about it in his Dissenting Opinion, quoted elsewhere.

The defendants contend, also, that the sixth section of the Statute of Limitations, of 1863, which provides that "no action shall be maintained unless it appear that the plaintiff was seized or possessed within five years before the suit," of itself bars the action.

Such, however, is not the effect of that section.

Mere want of actual occupation for five years before suit brought, is not enough, of course, to prevent plaintiff from maintaining ejectment. Section 6 of the statute is, by some, supposed to provide that it is. But when Section 6 is taken along with Section 9, which provides that land not held adversely to the legal title shall be deemed held in subordination to it, it is apparent the last possessor recovers. Again, it is apparent, it would be useless to require the occupant to hold adversely five years, if the mere want of occupation by plaintiff, during that time, would bar him. The effect of Section 6 was so expounded in *Sharp v. Daugney* (33 Cal., 505). But Section 6 of the statute does not run any more than the rest of it, on account of the Spanish proviso.

The cases of *San Francisco v. Fulda* (37 Cal., 349); *Figg v. Mayo* (39 Cal., 263); and *Cannon v. Stockman* (*ut supra*), are cited by the defendants; but a cursory look at them will show they do not assist the defendants.

The defendants, by way of illustration, as they say, put a case in their brief where a reversioner pending an unexpired term of years leases to a stranger, and the stranger holds five years adversely to the termor, and argue that because the stranger

does not bar the reversioner, it is not necessary possession to be adverse should be exclusive of any title but the plaintiff's. The supposed case throws no light on the question. Of course, the lessee does not bar his landlord, and, of course, he is not required to bar the landlord. The landlord's title is his title.

The defendants also say that the fact a tenant by the courtesy and a tenant for life or years may be barred by an adverse possession when the reversioner is not, establishes the proposition that adverse possession need not be exclusive. They cite authorities to show that such tenants may be barred.

Without examining these authorities here, it is enough to remark that the reason why the reversioner is not barred, is because his right has not accrued.

The defendants are mistaken, too, when they say, as they do, that it is not the city's right of entry the plaintiff seeks to enforce. It matters not, in fact, whose right of entry it is which is sought to be enforced—it is a right of entry upon *land claimed under a Spanish grant—of which the plaintiff produces evidence the intestate estate is the owner.*

The effect of the cases cited by defendants (at p. 20 of their brief), seems to be that the statute will not the less run against persons not under disability because others having the same right of action are under disability.

The cases cited by the defendants, in which the Supreme Court of California has held that five year's possession of public land will bar any one who may have been ousted, are not conclusive of the case at

bar. When the case at bar was tried the doctrine of those cases had never been applied to any other land but the public domain.

The doctrine assumed in the case put by the defendants where A owning an unpatented Spanish grant is ousted by B, who in turn is ousted and kept out five years by C, who remains in until A gets his patent, has never been ruled. It is not law. It is an impossible case. B, the party supposed to have been barred, could not be made to admit that he had no deed from A, and C being a trespasser would not be allowed to prove it, and judgment would have to go for B if he showed the land was claimed under a Spanish grant not five years patented, or if C made a solemn admission as the defendants did here, that he did not claim title exclusive of every other title.

There is a reason for not requiring one to claim against the King. It is because it would be vain. The State Court, doubtless, in view of the maxim *nullum tempus occurrit regi*, were of opinion that the Legislature consequently never had it in their thoughts to consider the sovereign when they were legislating upon the subject of limitation of actions. But every one may be barred but the King, and therefore it was well to require one to give proof of his good faith by claiming against every one but the King.

The Pennsylvania and other cases cited on p. 21 of defendants' brief are not conclusive of the case at bar.

The defendants argue that plaintiff's position involves the absurdity of saying that a trespasser

upon land is not affected by the statute of limitations, while the owner is. They are mistaken. The case supposed is when a suit is brought to recover land held under a Spanish grant, and a patent over five years old, and after five years adverse possession. Of course the trespasser would be barred as the owner would be.

But after all the judicial attempts which have been made in California to defeat the plainly expressed will of the people, as expressed in the statute in question; to obliterate the words *exclusive of every other title* from it; after all the refining of learned counsel, we may grant the possession claimed to have been adverse was sufficiently so as to the persons it was adverse to,and there is not the slightest pretence for maintaining the plea.

The plea was that the defendants entered under claim of title exclusive of every other right, *founding their claim upon a written instrument, as being a conveyance.* This was the plea called for by the statutes. They swore in their answers they had recognized the title of the city; they based their good faith on the assertion they entered to *make title* under the City. They showed no deed or written instrument whatever.

The section they pleaded under is in the appendix.

They were bound to prove their plea as pleaded.

But if they were not — if it was sufficient to satisfy another section of the statutes (sec. 12) — their plea was not proved, because they did not enter under claim of title as required by that section.

Section 12 is in the appendix.

V.

The plaintiff is entitled to the benefit of the Act of Congress of March 8th, 1866.

The defendants claim that the plaintiff's rights were not enlarged by the 11th section of the Act of the Legislature of California of the 27th of March, 1866, and cite *Fischer* v. *Benicia*, (36 Cal. 562.) Inspection will show the case is not at all in point.

The defendants say that the intestate was not in possession after his death, nor during the five years next before the passage of the Act of Congress of March 8th, 1866.

The effect of the proofs on this point, as we have shown before, is that the intestate estate was in possession of the land until the first day of January, 1862, when it was ousted. On the 8th of March, 1866, when the Act of Congress gave the land to the City in trust, the plaintiff's right to recover the land in *ejectment* was not barred in any view of the statute, and the only question is whether the Act is to be interpreted as giving the land to the physical occupant of it on the 8th of March, 1866, regardless of the way he became such, or to the one that day entitled by the general law to recover it in *ejectment*. As remarked in our opening brief, the word *actual* in the description of the possession called for by the Act of Congress, as the criterion to determine who shall be the beneficiary, is supposed to be fatal to the plaintiff's pretentions -- to fix the physical occupant on the day in question as the beneficiary. But it is not enough the occupation was

actual in the sense of physical and personal; it must be *bona fide*.

When we meet the case where one is in the physical occupation in bad faith, construction is called for. We are called on to say who shall have the land, the mere occupant or the injured party? The mere occupant can not have it. Shall the person he ousted have it? Or shall it go to the City in trust for its inhabitants generally? In either case the plaintiff must have it. If the word *actual* yields to the words *bona fide*, and the party entitled to recover gets it, the plaintiff is found to be that person. If the word *actual* will not yield, but the land must go to the City in trust generally, the intestate estate gets it by the Act of the Legislature, and of the Supervisors of the County, which it will not be disputed are competent to dispose of it if there is no *cestui que trust* appointed by the Act of Congress. And the right thus confered by the Act of the Legislature would attach by relation as of the date of the Act of Congress, since the right of recovery on that day is made the criterion by which the beneficiary is determined, and certainly since the right thus obtained through the medium of the Act of the Legislature is a right derived under that Act of Congress. The City and Legislature in conferring it exercise a power expressly delegated by that Act. And it makes no difference in this case that the right thus conferred accrued afrer the suit was brought, or whether the doctrine of relation aid the plaintiff or not, as the plaintiff offered evidence that she was within the Act of the Legislature and its benefit,

and the defendants took no exception to the evidence as unwarranted by the complaint.

The opinion of the State Court that the plaintiff must recover the land before she proves herself to be the beneficiary of the Act of the State Legislature, entirely overlooks words of the greatest importance in the Act—words avowedly used *ex industria* for the purpose of making the intent more clear. After granting the land to the *bona fide* actual possessor, or to one who has been ousted, and has recovered or may recover it, the Act goes on to declare that its intent and object is to pass the City's title to every tract to the *possessor* thereof.

These words apply not to the mere actual possessor, but to the legal possessor—the mere actual possessor having been already excluded by the words *bona fide*, and by provision for the party ousted.

The defendant's argument to show good faith is of the weakest and the most technical.

The effort to prove that plaintiff impliedly admitted the defendant's good faith by an admission which studiously denied that they had a sufficient adverse possession, will not succeed.

The defendant's remark, that one cannot hold adversely, and at the same time in good faith to the person he has ousted, is irrelevant. If the words *bona fide* were in the statute of limitation, the remark would not even be apposite, but the words belong to the Act of Congress, and are there used without any reference to the statute of limitations.

We think we have shown in our Opening Brief that the plaintiff was in the *bona fide* actual posses-

sion of the demanded premises on the 8th of March, 1866, by her tenants, in the sense of the Act of Congress of that date; and that if not, she is the beneficiary of that Act by appointment under the Act of the Legislature of March 27th, 1868.

It is claimed the Supreme Court of California has settled the question as to whether the intestate estate was in possession of the demanded premises on the 8th of March, 1866, in the cases of *Brooks v. Hyde*, (37 Cal. 394,) and *Irvine v. Adler*, (44 Cal. 566.) We do not think those cases have any such effect. But if they have they are not authority. Though constructions of a State law, they are yet constructions of a State law passed in execution of an Aet of Congress, and by virtue of authority delegated to the State Legislature by Congress.

It is objected that, as it was not proved that the plaintiff or any one had paid the taxes and assessments mentioned in the eleventh section of the act of the Legislature of March 27th, 1868, the intestate Estate cannot have the benefit of that section.

This is the doctrine of the case of *Dupond v. Barstow*, (45 Cal. 451), *decided since the case at bar was first decided*, and *now contested in this Court on the writ of error to the Supreme Court of California.*

It is true, plaintiff did not show she had paid the assessment and taxes before the first of April, 1868: but they were paid before that day by the defendants (Trans. fols. 26–27).

In view of this fact, counsel contend that there was no forfeiture of plaintiff's rights. We take this position on the ground that if the condition

was satisfied, it makes no difference who satisfied it.

The City had no interest in the land except to receive the monies charged upon it. It was not competent for the Legislature to authorize those monies to be collected from more parties than one. Having received them from one party the City Treasurer had no authority to receive them from another—he was *functus officio* in the matter of getting them in. Having received them once the City was secure—the party paying them being unable to reclaim them, as they were paid voluntarily and without protest. The City being satisfied, it could subserve no use to pay them the second time. Not being receivable, plaintiff had no occasion to offer to pay them.

The assessment and taxes were not in the nature of purchase-money. The taxes were the usual charge to which all property is subject. The assessment was a special equitable charge upon the property, levied that each recipient of the bounty of the City should contribute on the principal of general average to the compensation due those, whose lands had been taken for public use.

The assessment and taxes being merely charges on the land, were demands to be foreclosed, not treated as purchase-money, the payment of which was a condition precedent to the vesting of title. The equitable title was already vested. The party entitled to recover on the 8th of March, 1866, was the *cestui que trust*. He was appointed by the Act of Congress. He was the actual owner of the land in equity. The words *in trust* of the Act of Congress import a grant—an estate—something more

than a pre-emption right. The Act of 1868 provided he should have the legal title upon the satisfaction of the charges upon the land. No deed was necessary under that act. The plaintiff got the title the moment the assessment and taxes were paid. The intruder paying cannot complain. He pays in his own wrong.

Dupond v. Barstow, (45 *Cal.*, 45,) in weich the Supreme Court of California has decreed this forfeiture was decided after the case at bar was decided by that Court, and is now on appeal in this Court.

The doctrine that plaintiff forfeited his equity by non-payment cannot be favored. The law abhors a forfeiture.

The forfeiture asserted is not expressly denounced by the Act of 1868. It is decreed avowedly upon an implication. It is unjust in itself. It takes the property of one man and gives it to another for an infinitesimal part of its value. It takes the property of the owner without giving just compensation. It forecloses a lien upon his land without judicial action. It deprives him of the usual right of redemption. It favors the usurper and wrongdoer at the expense of the person wronged.

It will not be decreed for non-performance of a vain and useless act—of an act, though physically possible, yet legally impossible.

As remarked before, no penalty of forfeiture is denounced upon non-payment by the day. If nonpayment is to be visited with a penalty, it must be found by implication. Implication certainly will not furnish a penalty not called for by the offense—not proportioned to it—never applied to its con-

geners. Lands are not forfeited for taxes. They are sold for them. Why forfeit these lands for the charges resting on them? What analogy furnishes the penalty of forfeiture here?

If plaintiff did not forfeit her equity, and yet did not get the legal title, she must recover on her prior possession.

The supposed forfeiture is unconstitutional.

Scammon v. Chicago, 44 Ills., 269.
Clayton v. Chicago, Ibid., 280.

But we are not put to the necessity of reasoning and deduction to determine the estate of the party entitled to possession on the 8th of March, 1866, or the penalty upon the non-payment of the assessment or the taxes by the first of April, 1868. The Legislature had expressly settled the matter by an Act, passed on the same day in 1868, with the principal act which has been considered.

(Sess. Acts, 1868, p. 410. *Appendix Ex. E.*)

The two Acts are one. Instead of impliedly denouncing a forfeiture for non-payment of the assessment, as the Court in *Dupond v. Barstow*, *ut supra* says the main act does, they expressly provide that it shall have the same force, effect, and validity as an assessment-roll duly approved by the Board of Equalization, and shall be collected by the Tax Collector in the same manner as State and County taxes are collected, and that all the revenue laws shall apply to its collection.

The employment of such machinery, and the right of redemption created by the application of

the Revenue-Laws are utterly inconsistent with a forfeiture for non-payment of the assessment.

So, too, the foreclosure of an unpaid assessment is inconsistent with forfeiture for non-payment of taxes. Why different penalties for omission of identically same character? Why the severe penalty of forfeiture for non-payment of taxes — a mere *obolus*—and foreclosure only for the graver delinquency of non-payment of assessment.

Again, how can the Court even suspect, much less convict, the Legislature of denouncing a forfeiture, for non-payment of taxes? Declare that if the taxes were not paid within four days, the lands should be forfeit! They were to be paid before the first day of April, 1868, and the law was passed March 27th, 1868. Was rapacity, such as this would be, ever heard of amongst an enlighented people? The most cynical and gangrened satirist could not accuse the Legislature of this. There was no promulgation of the Act to give the notice. If the Legislature intended such a forfeiture, it was worse than Caligula. The Roman posted his laws high and in small characters. Our tyrant, as the Legislature is, if there is a forfeiture, did not post at all.

It is observable that the supplementary act of March 17th, 1868, does not provide a mode of collecting the taxes of the five fiscal years next preceding July 1st, 1866, and it may be argued that the payment of them is therefore a condition precedent to the vesting of title. But this is not so; the taxes were made a legal charge, as such, when

the act made them payable, and were collectable and to be collected according to the general law.

The idea there was a condition precedent, and in case of non-performance a forfeiture is countenanced by no single circumstance, but the mere fact that a day is fixed before which the taxes must be paid. A day, however, had to be fixed. A day is always fixed when taxes become *delinquent*. If a day is not fixed, the collection cannot be enforced.

We submit that the Act of 1868 can receive no other interpretation than that it gave the land to the party entitled by prior possession to recover it on the 8th of March, 1866, subject to certain legalized taxes and assessments, which *ex vi termini* were to be collected, when delinquent, as other taxes; that this title, though cast on the plaintiff after the suit began, accrued before, by relation; that is to say, it accrued as of the date of the possession which was made its source—March 8th, 1868; also, because it was confirmed to the plaintiff by an act of the Legislature of California, executory of the act of Congress of that date.

We submit further, that if the plaintiff did not get the legal title, her equity was not foreclosed, and plaintiff must recover on her prior possession.

CALHOUN BENHAM,
E. J. & J. H. MOORE,
ALEXANDER CAMPBELL,
SOLOMON HEYDENFELDT,
Attorneys for Plaintiff.

San Francisco, Cal., Jan. 11, 1876.

This paper has been prepared very hurriedly, as the stipulation submitting the case on briefs alone, was not signed by all of the defendant's counsel until the of December last, and as one of the plaintiff's counsel has been absent from the State until a few days ago. The counsel for plaintiff hope the Court will, therefore, excuse the length of the paper, and its want of strict connectedness.

APPENDIX.

EXHIBIT A.

United States Land Commission for California.

Decree of confirmation, filed December 21st, 1854.

THE CITY OF SAN FRANCISCO,
vs.
THE UNITED STATES. } No. 280.

In this case, on hearing the proofs and allegations, it is adjudged by the Commission, that the claim of the petitioner is valid, and it is therefore decreed that the same be confirmed.

The land of which confirmation is made, is that known by the name of the Pueblo lands of San Francisco, and is bounded as follows : Beginning at the little cove at the east of the Fort, and running across the beach so as to leave the Fort and casamata to the north ; thence runnnig along the beach to Point Lobos on its southern part; thence a straight line to the summit of the Devisadero, continuing said line to the east as far as the Punta del Rincon, including the canutales and El Gentil, the said line will terminate within the Bay of the Mis-

sion of Dolores—the estuary of which will form a natural boundary beteen the municipal jurisdiction of that Pueblo and the said Mission of Dolores; thence along the shore of the Bay of San Francisco as it existed in the year 1834, to the point of beginning. For a more particular description, reference to be had to the copy of the order from Governor Jose Figueroa to General Mariano G. Vallejo, dated Monterey, November 4th, 1834, marked Exhibit No. 18, to the disposition of M. J. Vallejo, taken in No. 280, H. I. T., and now on file among the papers in the case.

ALPHEUS FELCH,
R. AUG· THOMPSON,
S. B. FARWELL.

EXHIBIT B.

Final decree confirming the claim of the City of San Francisco to its Pueblo lands, entered May 18, 1865.

THE CITY OF SAN FRANCISCO
vs.
THE UNITED STATES.

The appeal in this case taken by the petitioner, the City of San Francisco, from the decree of the Board of Land Commissioners, to ascertain and settle the private land claims, in the State of California, entered on the twenty-first day of December, 1854, by which the claim of the petitioner was

adjudged to be valid, and confirmed to lands within certain described limits, coming on to be heard upon the transcript of proceedings and decision of said Board, and the papers and evidence upon which said deceision was founded, and further evidence taken in the District Conrt of the United States for the Northern District of California, pending said appeal—the said case having been transferred to this Court by order of the said District Court, under the provisions of section four of the Act entitled "An Act to expedite the settlement of titles to lands in the State of California," approved July 1st, 1864—counsel for the Uuited States, and for the petitioner, having been heard and due deliberation had, it is ordered adjudged snd decreed, that the claim of the petitioner, tne City of San Francisco, to the land hereinafter described, is valid, and that the same be cofirmed.

The land of which confirmation is made, is a tract situated within the County of San Francisco, and embracing so much of the extreme upper portion of the peninsula above ordinary high water mark (as the same existed at the date of the conquest of the country, namely: the seventh day of July, A. D. 1846); on which the City of San Francisco is situated, as will contain an area of four square leagues—said tract being bounded on the north and east by the Bay of San Francisco, on the west by the Pacific Ocean, aad on the south by a due east and west line, drawn so as to include the area aforesaid, subject to the following deductions, namely: such parcels of land as have been heretofore reserved or dedicated to public uses by the

United States ; and also such parcels of land as have been by grants from lawful authoriy vested in private proprietorship, and have been confirmed to parties claiming under said grants by the tribunals of the United States, or shall hereafter be finally confirmed to parties claiming thereunder by said tribunals in proceedings now pending therein for that purpose ; all of which said excepted parcels of land are included within the area of four square leagues above mentioned, but are excluded from the confirmation to the City. *The confirmation is in trust for the benefit* of the lot holders under grants from the Pueblo Town, or City of San Francisco, or other competent authority, and as to any residue *in trust for the use and benefit of the inhabitants of the city.*

San Francisco, May 18th, 1865.

FIELD, Circuit Judge.

EXHIBIT C.

An Act to Quiet the Title to certain Lands within the corporate limits of the City of San Francisco.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled :

Thas all the right and title to the United States to the land situated within the corporate limits of the City of San Francisco, in the State of California, confirmed to the City of San Francisco by the decree of the Circuit Court of the United States for

the Northern District of California, entered on the 18th day of May one thousand eight hundred and sixty-five, be and the same are hereby relinquished and granted to the City of San Francisco and its successors, and the claim of said city to said land is hereby confirmed, subject, however, to the reservations and exceptions designated in said decree, and upon the following trusts, namely: that all the said land not heretofore granted to the said City, *shall be disposed of and conveyed by said city to parties in the bona fide actual possession thereof, by themselves or tenants, on the passage of this act, in such quantities and upon such terms and conditions as the Legislature of the State of California may prescribe*, except such parcels thereof as may be reserved and set apart by ordinance of said city for public uses, provided, however, that the relinquishment and grant by this act shall not interfere with or prejudice any valid adverse right or claim, if such exist, to said land, or any part thereof, whether derived from Spain, Mexico or the United States, or preclude a judicial examination and adjustment thereof.

Approved March, 8th, 1866.

EXHIBIT D.

An act to Confirm a certain Order passed by the Board of Supervisors of the City and County of San Francisco. Approved, March 27th, 1868. (*Sess. Acts p.* 379.)

"SEC. 11. Upon the payment to the County Treasurer of the City and County of San Francisco

of the amount assessed by the committee provided for in section thirteen of this order, upon the lands as provided for in section ten of this order, the City and County of San Francisco hereby relinquishes and grants all the right, title and claim which the said city and county now has or may hereafter acquire as the successor of the Pueblo of San Francisco, or as the grantee or the patentee of the United States, in and to the lands hereinbefore in this order described, and not excepted or reserved, or intended to be excepted or reserved, by any of the preceding sections or provisions of this order, and which may not be set apart for public use under any of the preeding sections and provisions, and upon which shall be paid, previous to the first day of April, eighteen hundred and sixty-eight, all taxes which have been assessed thereon during the five fiscal years preceding the year beginning July first, eighteen hundred and sixty-six, unto the person, or to the heirs and assigns of persons, who were, on the eighth day of March, eighteen hundred and sixty-six, in the actual bona fide possession thereof, by themselves or their tenants, or, having been ousted from such possession before or since said day, have recovered or may recover the same by legal process. And it is hereby declared to be the intent and object of this section to pass the right, title and claim of the said city and county in and to every tract or portion of said land delineated on said map, except the portions that are or may be reserved as aforesaid, possessed by one person, unto the possessor thereof in severalty; and every separate tract or portion thereof, except the portions that are or may

be reserved as aforesaid, possessed by more than one person, jointly or in common, unto the possessors thereof, jointly or in common.

EXHIBIT E.

CHAPTER CCCXLII.

An Act further to provide for the ratification and confirmation of a certain Order passed by the Board of Supervisors of the City and County of San Francisco, and to modify certain provisions of the same.

[Approved March 27, 1868.]

The People of the State of California, represented in Senate and Assembly, do enact as follows:

SECTION 1. Nothing in the provisions of a certain order passed by the Board of Supervisors of the City and County of San Francisco, numbered eight hundred, and entitled "An Order for the settlement and quieting titles to land in the City and County of San Francisco, situate above high water mark of the Bay of San Francisco and the Pacific Ocean, and without the corporate limits of the City of San Francisco," nor in the provisions of any Act confirming or purporting to confirm the same, shall authorize the said Board to exchange any lands set apart and reserved, or to be set apart and reserved, for a cemetery or a park, nor to deprive the said Board of the power of taking immediate possession of any lands hereafter reserved for public use under the provisions of said Order Number Eight Hundred, or by virtue of the terms of an

Act of Congress approved March eighth, eighteen hundred and sixty-six, entitled an Act to quiet the title to certain lands within the corporate limits of the City of San Francisco.

SEC. 2. Whenever the report of appraisement mentioned in section ten of said Order Number Eight Hundred shall have been made and filed, as therein provided, it shall be the duty of the City and County Recorder to make out, certify and deliver to the Tax Collector of said city and county a copy of the same, which copy shall be deemed and held to have the same force, effect and validity, in regard to the sums therein assessed, as an assessment roll duly approved by the Board of Equalization in regard to State and County taxes. The said Tax Collector shall proceed to collect the said several sums of money assessed in said report in the same manner as State and county taxes are collected by him in said city and county; and all the provisions of the various Acts relating to the collection of the public revenue in said city and county not inconsistent with the provisions of said Order Number Eight Hundred, nor the provisions of this Act, shall apply to the collection of the sums of money so assessed as aforesaid.

SEC. 3. This Act shall take effect from and after its passage (Sess. Acts p. 410.)

EXHIBIT F.

An Act defining the time for commencing civil action, passed April 22, 1850.

Sec. 6, as amended by act approved April 11, 1855. (*Sess. Acts, p.* 109.)

No action for the recovery of real property, or for the recovery of the possession thereof, shall be maintained unless it appear that the plaintiff, his ancestor predecessor or grantor was seized or possessed of the premises in question, within five years before the commencement of such action, *provided, however, that an action may be maintained by a party claiming such real estate, or the possession thereof under title thereof derived from the Spanish or Mexican governments, or the authorities thereof, if such action be commenced within five years from the time of the final confirmation of such title by the government of the United States, or its legalally constituted authorities.*

EXHIBIT. C.

An act to amend an act entitled An Act defining the time for commencing a civil action, passed April 22, 1850. Approved April 18, 1863. Sess. Acts, p. 325, Sec. 1, repeals the foregoing proviso as to Spanish grants.

Sec. 6. The time that shall have already run under the act to which this is amendatory when this act takes effect, shall be taken and computed as a portion of the time limited for the commencement of an action * * * * * *; provided, * * * that any person claiming real property, or the possession thereof, or any right or

interest therein, under title derived from the Spanish or Mexican governments, or the authorities thereof, which shall not have been finally confirmed by the government of the United States, or its legally constituted authorities, more than five years before the passage of this act, may have five years after the passage of this act in which to commence his action for the recovery of such real property, or the possession thereof, or any right or interest therein * * * .

EXHIBIT H.

OPINION.

Filed July 11, 1872.]

McManus v. O'Sullivan, [No. 2,340.] — This is an action to recover the possession of a portion of what is known as the "outside lands," in the City of San Francisco. The plaintiff introduced evidence tending to show actual possession in her intestate from 1854, to January 15th, 1861—the time of his death. It was admitted that the lands lay within the general area described in the decree of the United States Circuit Court of May 18th, 1865, and of the Act of Congress March 8th, 1866 (4 U. S. Stats., p, 4); and that the defendants were in possession at the commencement of the action. The defendants having moved for a nonsuit on certain specified grounds, among which was that the evidence showed an adverse possession in the defendants of more than five years before the commence-

ment of the action, the Court announced that if proof had been made of such adverse possession, the motion would have been granted; and that if such proof should be made, he would instruct the jury to find for the defendants. The plaintiff then admitted that ths defendants would introduce such proofs, and that the defendants were, and had been, in the actual, open, exclusive and notorious possession of the premises on and ever since the 1st day of January, 1862, and had held the same from that date adversely to the plaintiff, her ancestors, predecessors and grantors, and to the estate of McManus, deceased, but not to the City and County of San Francisco. The Court thereupon directed the jury to render a verdict for the defendants, and such verdict was rendered accordingly.

Of the many questions which have been discussed by counsel, only two require notice. It is conceded that the title to the premises was in the city. It is contended by the plaintiff, that, as she has shown prior possession in her intestate, it is the presumption of law that he acquired the title from the city. Prior possession—or more accurately stated, *possession*—is presumptive evidence of title. For the protection of the person in possession, the law raises the presumption that he holds such title as will enable him to resist the entry of one who comes without right. The presumption usually indulged is that he holds the fee, but not that he holds any particular title. In the presence of the true title, that presumption ceases. Hence, it becomes necessary in all cases where the parties are litigating the right to the possession alone, and neither party connects him-

self, by conveyance, with the primary source of title, that such title should be excluded from consideration as a false quantity. The acquisition of such a title by the person in possession of premises, will not be presumed from the mere fact of prior possession.

The principal question in the case is, whether adverse possession, in order to be sufficient to constitute a defense to an action for the recovery of the possession of lands, must have been adverse to all existing titles. In many cases it is said that the possession must be "adverse to all the world;" and in some of those cases, that language was used as equivalent to, *adverse to all existing titles*; and in others, the language was applicable only to the title held by the plaintiff. It will be found, upon the examination of the cases in the English courts, that, in a majority of instances in which adverse possession was relied upon and sustained, the defendant entered and held in full recognition of the title of the lord. In other cases, it is held that adverse possession, which was sufficient as against the holder of the particular estate, would not bar the remainder man. But we do not propose, in this opinion, to enter upon a review of the cases, for the labor would be unprofitable, as the rule on the point in question has been settled in this state, not only by direct authority, but by the practice of the Courts of the state. In Union Water Company vs. Crary (25 Cal., 509,) the statute of limitation was applied to a right or claim to the use of the water of a stream running upon the public lands of the United States. The defendants in Page vs.

Fowler, (28 Cal., 611) did distinctly recognize the title of the United States, and in fact, alleged that they were in a position to claim the benefit of the pre-emption laws of the United States, but they were treated by the court as in the adverse possession of the lands mentioned in the pleadings. As neither party connected himself with the title in the United States, the title was rejected in determining the rights of the parties. And such has been the uniform ruling of this court in controversies respecting or growing out of the possession of the public lands of this State, (See also, LeRoy vs. Rogers, 30 Cal., 235, and Vassault vs. Seitz, 30 Cal., 230.)

In the courts of this State, actions almost without number have been brought to recover the possession of real estate, in which both parties relied upon possession alone, without deraigning title from the Government. In some instances the title was in the United States, and in others, in this State, and in many instances the land was within the lines described in the Van Ness ordinance; and in all these cases, where the statute of limitation had run a sufficient time to constitute a bar, and the defendant relied upon the statue, the plea was sustained by the courts, although both parties distinctly, or by necessary implication, admitted the title to be outstandlng in the United States, or in this State, or in the City of San Francisco. The rule is thus well established, so far as it can be established in that mode.

It is unnecessary, and perhaps it would be improper, to attempt to lay down in this case a rule that would be applicable when it is shown that the

title is outstanding in a private person; but we are of the opinion that where it is not shown that the title has passed to a private person, and the plaintiff relies upon prior possession alone, either in himself or the person under or through whom he claims, if the defendant show a possession which is sufficient in other respects, and is adverse to all rights and titles growing out of prior possession, but not to title in the Government, it constitutes a bar to the action.

Judgment affirmed.

RHODES, J

We concur:

NILES, J.,
BELCHER, J.

EXHIBIT I.

DISSENTING OPINION OF WALLACE, C. J.

I dissent from the opinion and judgment of the majority of the court, on the ground that the possession of the defendants, which is conceded not to nave been held adversely to the title of the City and County of San Francisco, cannot, for that reason, be considered to have been an adverse possession to be availed of by them for any purpose whatever. I am unable to distinguish between the effect of a recognition, by the defendants, of the city's title, and their recognition of the title of any third person, in an inquiry into the character of their possession as being in a legal sense adverse, or

otherwise. Nor in view of such admitted recognition of an outstanding title, either in the city or in in a third person, can I understand in what way such a possession of defendants, however long continued, would ripen into a title in them for any purpose, under the doctrine of Arrington vs. Liscom, (34 Cal., 365). The possession, which, if held during the requisite period, would operate to create a right in the defendants, must be one held adversely to all the world, "with intent to claim the fee against all comers," and unless it be of that character, it must, upon the general principle recognized in the opinion of the majority, fail to vest the title in the possessor. A recognition by him of title outstanding in a third person must necessarily operate to change the character of the possession, and in this respect it matters not, in my judgment, whether the recognized outstanding title be in the United States, in the City of San Francisco, or in some private person. The recognition by the defendants of a superior outstanding title in any quarter is absolutely incompatible with a simultaneous adverse possession upon their part, for that is made up not only of the fact of possession, but of the *quo animo* with which that possession was taken and held.

WALLACE, C. J.

Due Service accepted by copy, this.....

day of January, A. D. 1876.

Attorneys for Defendants in Error.

No. 543.

In the Supreme Court of the United States.

ISABELLA McMANUS,

Administratrix of the Estate of

T. B. McMANUS,

Plaintiff in Error,

VS.

C. D. O'SULLIVAN et als.,

Defendants in Error.

POINTS AND AUTHORITIES OF DEFENDANTS IN ERROR.

JOHN M. COGHLAN,
WILLIAM IRVINE,
Of Counsel.

GRAY & HAVEN,
SHARP & LLOYD,
WILLIAM H. PATTERSON,
San Francisco, Cal,,
Attorneys for said Defendants in Error.

Supreme Court of the United States.

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ISABELLA McMANUS,
Administratrix of the Estate of
T. B. McMANUS,
Plaintiff and Plaintiff in Error,

vs.

C. D. O'SULLIVAN ET AL.,
Defendants and Defendants in Error.

In Error to the Supreme Court of the State of California.

Sir:

You will please enter my appearance for Peter Donahue, impleaded herein as John Hays, Thomas Maguire and John Doe Hawkins, the defendants in error in this cause.

WM. IRVINE, Attorney,
Of Counsel for said Defendants in Error.

SHARP & LLOYD,
Attorneys for said Defendants,
San Francisco, Cal.

To D. W. MIDDLETON, Esq.,
Clerk of the
U. S. Supreme Court.

Supreme Court of the United States of America.

No. 543.

ISABELLA McMANUS,
Administratrix of the Estate of
T. B. McMANUS,
Plaintiff and Plaintiff in Error,

vs.

C. D. O'SULLIVAN ET AL.,
Defendants and Defendants in Error.

In Error to the Supreme Court of the State of California.

Sir:

You will please enter my appearance for C. D. O'Sullivan, Wm. F. Cashman, C. M. A. Buckley for herself and the minors John P. Buckley, Edmund J. Buckley, Vincent P. Buckley and Mary C. Buckley, by C. M. A. Buckley, their general guardian: Chas. Bauman impleaded herein as John Doe, and George T. Bohen, impleaded herein as Richard Roe, and David Hunter impleaded herein as John Brown, the defendants in error in this cause.

JOHN M. COGHLAN,
For said Defendants in Error.

GRAY & HAVEN,
Attorneys for said Defendants,
San Francisco, Cal.

To D. W. MIDDLETON, Esq.,
Clerk of the
U. S. Supreme Court.

Supreme Court of the United States.

No. 543.

ISABELLA McMANUS,
Administratrix of the Estate of
T. B. McMANUS,
Plaintiff in Error.

vs.

C. D. O'SULLIVAN ET AL.,
Defendants in Error.

In Error to the Supreme Court of the State of California.

POINTS AND AUTHORITIES OF DEFENDANTS IN ERROR.

ABSTRACT OF THE CASE.

This action was commenced on the 17th day of August, 1867, in the District Court of the Fourth Judicial District of the State of California, a Court of original jurisdiction in all cases in equity, also in all cases at law which involve the title or possession of real property. Judgment was entered 16th August, 1869, for the defendants, and plaintiffs appealed to the State Supreme Court, where the judgment was affirmed.

This is an action to recover the possession of a portion of what is known as the "Outside Lands," in the City of San Francisco; that is, land outside of the Charter boundary line of 1851, and within the limits of the City and County of San Francisco, when this action was commenced.

Upon the trial in the District Court, before a jury, the plaintiff introduced evidence tending to show actual possession in

her intestate from July 1854, to January 15th, 1861, the time of his death. There was proof of his death and that plaintiff was duly appointed administratrix on 6th June, 1867.

It was then admitted:

That the lands sued for lie within the description of the lands embraced in the judicial decree in the cause United States vs. The City of San Francisco, entered May 18th, A. D. 1865, in the United States Circuit Court, in and for this District of California; also, within the area described in the Order No. 800, of the Board of Supervisors of the City and County of San Francisco, passed January 14th, 1868, (Exhibit D hereof,) and of the Act of the Legislature of the State of California, entitled, "An Act to confirm a certain Order passed by the Supervisors of the City and County of San Francisco," approved March 27th, 1868, and of the Act of Congress of the 8th day of March, A. D. 1866, entitled "An Act to quiet the title to certain lands within the corporate limits of the City of San Francisco," approved March 8th, 1866.

It was also admitted, that defendants had been in clear, adverse possession of the land claimed by plaintiff. more than five years before this suit was commenced, and the defendants had continued such adverse possession ever since, and were in possession at the commencement of this action.

Plaintiff, by her counsel, also admitted, *for the purpose of this matter*, that the defendants were in the actual, open, exclusive and notorious possession of the land in controversy for more than five years prior to the commencement of this suit, and on and ever since the first day of January, A. D. 1862, and had held the same from that date, adversely to the plaintiff, her ancestors, predecessors and grantors, and to the estate of T. B. McManus, *but not to the City and County of San Francisco.*

Defendants then moved for a non-suit, and the jury under the direction of the Court, rendered a verdict for the defendants. Judgment was entered for the defendants; plaintiffs appealed; the judgment was affirmed, and plaintiff has sued out a writ of error to this U. S. Supreme Court.

This case is reported in 48 California Reports, p. 7.

One of the grounds upon which the motion for a non-suit was rested was, that the evidence does not show, or tend to show, that the plaintiff, or her ancestors, predecessors or grantors, or either of them, were seized or possessed of the premises

or any part thereof, at any time within five years next before the commencement of this action, or at any time since.

POINTS AND AUTHORITIES.

I.

This case is not controlled by a Federal question, and the judgment must be affirmed without examination of other matters or issues.

U. S. Revised Statutes, § 709.
Murdock v. City of Memphis, 20 Wallace, 591.
The Railroad v. Maryland, 20 Wallace, 643.
McManus v. O'Sullivan, 48 Cal. R., p. 16.
Statutes of California, 1863, p. 325.

II.

The naked possession antecedently held by plaintiff's intestate, cannot operate to create a presumption that the claim of the possessor was connected with the Spanish title, or any particular source of title.

1 Greenleaf Ev. Sec. 16, 17.
Cannon v. Stockman, 36 Cal., p. 536.
San Francisco v. Fulde, 37 Cal. 352.
Herman on Estoppel, Sec. 526, p. 500.
Watkins v. Peck, 13 N. H., p. 377.
3 Cruise's Digest, Title XXXI, Chap. I, § 12, § 3.
2 Washburn on Real Property, p. 449.
2 Greenleaf Ev., § 538, § 539.
McManus v. O'Sullivan, 48 Cal. R., p. 17.

III.

The plaintiff's right of action was barred by the Statute of Limitations, before this suit was commenced.

IV.

The plaintiff is not entitled to the benefit of the Act of Congress of 8th March, 1866, and the defendants are the *cestui que trust* under said act.

V.

The McManus estate was not in possession of the premises by its tenants, on the 8th March, 1866. The defendants were not tenants of the plaintiff or of her intestate.

JOHN M. COGHLAN,
Of Counsel.

GRAY & HAVEN,
Attorneys for Defts.

BRIEF OF ARGUMENT.

I.

This case is not controlled by the Federal question, and the judgment must be affirmed without examination of other matters or issues.

The writ was issued under Section 709, of the U. S. Revised Statutes, which is the sole law governing the jurisdiction of this Court in this case, and has been carefully considered and construed in

Murdock v. City of Memphis, 20 Wallace, p. 591.
The Railroad Company v. Maryland, 20 Wallace, p. 643.

The only Federal question which is claimed to exist in this case, is stated by counsel in his brief (page 3,) to be, that plaintiff's intestate had been deprived of a right or immunity to which he was entitled under the treaty of Guadaloupe Hidalgo, Acts of Congress of March 3d, 1851. and of March 8th, 1866, and Act of the State Legislature of 27th March, 1868.

On the trial neither party produced or proved actual deed or patent from the city or from the United States.

The facts creating the plaintiff's alleged lost right or immunity, and upon which the alleged Federal question depends, are as follows :

The City of San Francisco, as successor of the pueblo of that name, asserted title to four square leagues of land, and presented its claim to the Board of Land Commissioners created by the Act of Congress of March 3d, 1851. The Board confirmed the

claim to a portion of the land, and rejected it for the balance. The city appealed to the District Court, from which Court the case was transferred to the U. S. Circuit Court. The Circuit Court confirmed the claim for four square leagues, and the decree was entered May 18th, 1865. From the decree of the Circuit Court a writ of error was prosecuted to the Supreme Court of the United States, and while the case was pending there, Congress, on the 8th of March, 1866, passed the Act "to quiet the title to certain lands within the corporate limits of the City of San Francisco." This Act withdrew the claim from the further consideration of the Courts, so that no patent was issued for the land.

By the said Act of Congress the land was relinquished and granted to the City of San Francisco and its successors, upon the following trusts, namely: "that all the said land not heretofore granted to said city shall be disposed of and conveyed by said city to parties in the *bona fide*, actual possession thereof, by themselves or tenants, on the passage of this Act, in such quantities, and upon such terms and conditions as the Legislature of the State of California may prescribe.

The Legislature, by Act of 27th of March, 1868, prescribed the conditions and terms to be: "Upon the payment to the County Treasurer of the City and County of San Francisco, of the amount assessed by the Committee provided for, the City and County of San Francisco hereby relinquishes and grants all the right and title and claim which the said City and County now has or may hereafter acquire as successor of the Pueblo of San Francisco, or as grantee or the patentee of the United States in and to the lands hereinbefore in this order described, and not excepted or reserved, or intended to be excepted or reserved, by any of the preceding sections and provisions, and upon which shall be paid, previous to the first day of April, A. D. 1868, all taxes which have been assessed thereon during the five fiscal years preceding the year beginning July first, A. D. 1866, unto the persons, or to the heirs and assigns of persons who were on the 8th day of March, A. D. 1866, in the actual *bona fide* possession thereof, by themselves or their tenants, or having been ousted from such possession, before or since said day, have recovered or may recover the same by legal process. And it is hereby declared to be the intent and object of this section to pass the right, title and claim of the said city and

"which decree and act the title of the city is derived), nor from "the ordinance of the Board No. 800, nor the act of the Legis- "lature ratifying that ordinance, which deal with the terms and "conditions upon which that title is to pass to the beneficiares "pointed to in the act of Congress.

* * * * * * * *

"It results from these views that the action was barred and "that the judgment of the Court below was correct, and should "be affirmed; and it is so ordered."

McManus vs. O'Sullivan, 48 Cal. R., p 17, 19.

Inasmuch then as plaintiff failed to connect herself by evi- dence with the federal question, there is no ground for this Writ of Error, and the judgment of the California Supreme Court should be affirmed.

But if this Court should not agree with us and be of the opinion that the possession of plaintiff's intestate did create of presumption of United States title or true title, as termed by plaintiff's counsel, we further contend that the federal ques- tion is not the controlling question in the case, but plaintiff's action is barred by the State Statute of Limitations aforesaid, and on this ground the judgment of the State Court should be affirmed.

This Court has said, if the federal question was erroneously decided:

"Then the Court must further inquire whether there is any "other matter or issue adjudged by the State Court sufficiently "broad to maintain the judgment, notwithstanding the error in "the decision of the federal question. If this be found to be "the case, the judgment must be affirmed without examination "into the soundness of such other matter or issue."

Murdock vs. City of Memphis, 20 Wallace, 636.

We respectfully submit that the Statute of Limitations of the State of California is sufficiently broad to maintain the judg- ment of the Supreme Court, notwithstanding any error in the decision of the federal question, and therefore the judgment of the State Court should be affirmed without examination into the soundness of the ruling of the State Court upon that Statute.

In their opening brief, plaintiff's counsel have made four points, which we will proceed to answer.

II.

Plaintiff's first point is:

The possession by plaintiff's intestate, and by his estate was evidence of title, and as it appeared that the true title was a Spanish grant, the possession was evidence of that title. He remarks that "Presumption of title is presumption of true title, and when "it is proved what the true title is, presumption of title is pre-"sumption of that title." (Page 4.)

We controvert this proposition. Presumptions are made in the *absence* of facts, not in the *face* of the facts. Suppose A sues B, and proves prior possession in himself and title in C, and stops. No presumption would arise from A's possession that he had C's title. Here plaintiff proves prior possession in her intestate, and then by admission shows the title in the city or elsewhere not in herself; is there any presumption from her possession that she has the title, which she admits is outstanding, and therefore has not?

There can be no presumption against the Sovereign, the original source of title—which in this case is the United States—but it is true the possession of land for a length of time mentioned in the Statute of Limitations, under a claim of absolute title and ownership, constitutes against all persons, but the Sovereign a conclusive presumption of a valid grant.

1 Greenleaf Evidence Sec. 16.

Cannon vs. Stockmon 36 Cal. R., p 536.

San Francisco vs. Fulde 37 Cal. 352.

Hence we must suppose that when plaintiff's counsel use the expression "presumption of title," he intends thereby to assert the existence of a presumption that plaintiff holds under a grant from the original service of title. But at the date of the possession of plaintiff's intestate, to wit: January, 1861, and previous, no grant could have been made, for it appears by the admissions (Trans. folio 40) that the title was not until March, 1866, attempted to be conveyed by the United States through the aid of Congress, more than five years after the plaintiff's proved possession terminated.

A conveyance or grant will not be presumed where the orig-

inal enjoyment was consistent with the fact of there having been no grant.

Herman on Estoppel Sec. 526, p 500.

There is no presumption of grant or title where the owner was an infant or insane, and could not make title.

Watkins vs. Peck 13 N. H. p 377.

A presumption by immemorial usage therefore can in general only be for things which may be created by grant; for the law allows prescriptions only in supply of the loss of a grant. Ancient grants must often be lost; and it would be hard that no title could be made to things lying in grant, but by showing the grant. Upon immemorial usage, therefore, the law will presume a grant and a lawful beginning, and allows such usage for a good title, *but still it is only to supply the loss of a grant.* Therefore, for such things as can have no lawful beginning, nor be created at this day, by any manner of grant, or reservation or deed that can be supposed, a prescription is not good.

3 Cruise's Digest Title XXXI. Chap. 1, § 12.

Hence we conclude there can be no grant presumed, because no grant could at that day exist, or have been previously made.

Again, every presumption of a grant is founded upon the acquiescence of the parties from whom the grant must or could come.

3 Cruise's Digest Title XXXI. Chap. 1, § 3.

Therefore, "presumption of title" does not presume true title as claimed by plaintiff's counsel, but only the title of those acquiescing. The Sovereign, whether it be Spain, Mexico, or the United States, cannot acquiesce so as to be deprived of the Sovereign title; then the position of plaintiff's counsel is untenable when they claim that plaintiff's evidence was sufficient to create a presumption of a Spanish grant, or any other particular class or character of grant unconnected with the parties acquiescing.

Again, every presumption must be supported by the Statute of Limitations, or it cannot exist to support a grant. Mere

possession alone is not sufficient to create the presumption, unless the possession has been for the limit of the statute.

1 Greenleaf Ev. § 17.
2 Washburn on Real Property p 449.
2 Greenleaf Ev. § 538, § 539.

In this case the State Court says: "But a mere naked pos-"session antecedently held by the plaintiff's intestate, and not "sufficient in point of duration to entitle him to the protection "of the Statute of Limitations, cannot operate to create a pre-"sumption that the claim of the possessor was connected with "any particular source of title. * * * * * * * We "are therefore of the opinion that the mere possession of Mc-"Manus did not, in itself, tend to connect his claim with that of "the city."

McManus vs. O'Sullivan 48 Cal. R. p 17.

III.

The plaintiff's action is barred by the statute of limitations.

The plaintiff's evidence of actual possession was insufficient. The acts of control and dominion were too slight to constitute any evidence of title. The occupation was temporary and at intervals. The enclosures were not substantial. Even they were allowed to wither and decay. (See evidence of M. S Coook and R. Sheridan. Trans.)

Borel vs. Rollins, 30 Cal. 408.
Polack vs. McGrath, 32 Cal. 15.
Canon vs. Union L. Company, 38 Cal. R., p. 673.
King vs. Louderback, Oct. Term, 1867, Cal. Sup. Ct.
Page vs. O'Brien, 36 Cal. 559.

But grant that the evidence of plaintiff's possession was such, if nothing more appeared, as to carry the case to the jury, still, under the proofs and the subsequent admission, the direction of the Court was proper.

The appellant argues that the admission is ineffectual to aid us. Ineffectual, because it was only admitted that our

adverse possession was "adverse to the plaintiff, but not to the City of San Francisco;" it was therefore not *exclusive*, and therefore not adverse.

There is in the State of California a relative or qualified adverse possession.

Where the true title is not in contest, where it is outstanding in the Government, where it appears or is admitted that the legal title is outstanding, and that neither party connects himself with it, and their contest is only over those rights in the land that grow out of their respective possessions, there an adverse possession may obtain as between the parties to the contest.

The whole current of authorities of the State of California is that way. How as to the public lands? The cases are numerous.

Say the Supreme Court, in one of them, "To constitute *adverse* possession in such cases, it is sufficient if the defendant in possession claims the right to the possession against all the world *except* the United States."

Page vs. Fowler, 28 Cal. 611.

In that case the evidence failed "to show any legal right or title to the land in controversy, derived from the United States, in either the plaintiff or the defendants."

In that case, as in this, the true title was a false quantity. The defendants in possession are presumed rightly in possession. The plaintiff showing prior possession shows the better right until the defendants overcome it with a five years uninterrupted adverse possession. The finding in Sharp vs. Daughney, 33 Cal. 511, was only that the defendant had been in possession—not in the possession *adverse* to the plaintiff. If it be said that this rule is applicable only to lands, the title to which comes from the Government, we ask, why draw the distinction? And where draw it? The title to *these* lands comes either from the Mexican Government through the decree, or the act of Congress of March 8th, 1866, or both. Neither party connects himself with this paramount title. It is confessedly outstanding.

Their rights are to be settled independent of it, and regardless of it. If we showed an adverse possession against the plaintiff for five years, she had connected herself with the true title, which the admission leaves outstanding, by showing that she had acquired it, she would then show a right of action against us.

Vassault vs. Seitz, 31 Cal. R p. 230.

"Where one, possessing only those rights in the land that grow out of prior possession, is ousted, *after the expiration of five years, he is barred of his recovery;*" and if he thereafter acquires the title from the general government, it may properly be said that he then acquires an independent title, and that a right of action then accrues to him against the *adverse* possession."

Le Roy vs. Rogers, 30 Cal. 235.

And in another case the Court says: "The rights thus acquired (that is, those growing out of possession) may be held, granted, abandoned or lost by the same means as a right of the same character issuing out of the lands to which a private title exists. The right of the first appropriator may be lost in whole or in some limited portions by the *adverse* possession of another. And when such person has had the continued, uninterrupted and adverse enjoyment of the water course, or of some certain portion of it, during the period limited by our statute of limitations for entry upon lands, the law will presume a grant of the right so held and enjoyed."

Union Water Company vs. Crary, 25 Cal., 509.

And the presumption is that we, the present possessors, have the city title—if that be the true title.

And it would seem that this doctrine is a necessary incident or corollary of that other doctrine long since established in this State, that where the plaintiff relies solely upon prior possession, the defendant will not be permitted to show title outstanding in a stranger, to defeat the plaintiff's right of recovery. Else, a party in possession of lands in 1850, may recover today against one who entered and ousted him, and has held adversely to him since 1851, where the true title is outstanding.

If this be so, then there is no statute of repose as to the tenure by which the great mass of the lands in this State are held and possessed.

The defendant showing a five years' adverse possession, where the plaintiff relies only on prior possession, shows a better right than the plaintiff, either because of the bar of the statute, or because of a presumed abandonment by the plaintiff in analogy to the Statute bar. Either suits our purpose in this case. For more than five years after our entry and ouster, the plaintiff failed to sue. More than five years after her right of action accrued she asked redress of the Courts.

Bird v. Lisbros, 9 Cal. R., 1.
Coryell v. Cain, 16 Cal. R., 572.

Being in possession, and in possession adverse to the plaintiff for five years, and the plaintiff failing to connect herself with the paramount title, we show the better right to the possession. Plaintiff will not be permitted to overcome this better right shown in the defendants, any more than would the defendants be permitted, if the plaintiff sued within five years from the ouster, by proving title in a stranger.

Carleton v. Townsend, 28 Cal., 223.

But appellant argues that we commit *felo de se* by such a claim, that plaintiff's intestate had an adverse possession from 1854 to 1861, which, under the Statute of Limitations conferred title, and that was prior to ours, and superior, as ours ran from 1861 to 1867.

Prior but not superior. Our five years' adverse possession extinguished the plaintiff's possession, just as it would have extinguished the plaintiff's legal seizen, had she shown any.

Leffingwell v. Warren, 2 Black U. S. 605.
Arrington v. Liscom, 34 Cal., 383.
Cannon v. Stockmon, 36 Cal., 541.

The plaintiff must fail, as it appears that she was not in possession within five years before suit.

The sixth section of the Statute of Limitations of 1863, reads: "No action * * * shall be maintained unless it appear "that the plaintiff * * * * was seized or possessed * "* * * within five years before suit." The Statute of 1855 used exactly the same language. The sixth and suplementary section of the *Amendatory* Act of 1863 reads: "The

"time that shall have already run, under the Act to which "this is amendatory, when this Act takes effect, shall be taken "and computed as a portion of the time in this Act limited for "the commencement of an action on the making of a defence "thereto."

The plaintiff showed no legal seizin; did not connect herself with the paramount source of title; relied on prior possession. The case showed that she had no possession after January 15th, 1861. The defendants were in, and had been in possession from 1861 till suit, not under, but adversely to the plaintiff. The suit was commenced in August 1867. The plaintiff did not establish any legal title to the premises in herself, to bring into play the presumption of the ninth section of the Statute of Limitations.

San Francisco v. Fulde, 37 Cal. R., 349.

Figg v. Mayo, 39 Cal. R., 263.

Nor did she show any possession within the five years; on the contrary, it affirmatively appeared that the defendants had held such possession for more than five years before suit, and in no way recognizing plaintiff, but antagonistic to her, and she must fail. She cannot *maintain* this action.

Cannon v. Stockmon, 36 Cal., 540.

The delay in obtaining letters of administration did not obviate the running of the statute.

Tynan v. Walker, 35 Cal., 635.

The plaintiff's right accrued more than five years, and more than five years and six months, before August, 1867, when this suit was commenced.

The plaintiff did not bring herself within the exceptions of the Statute of Limitations touching titles derived from the Spanish or Mexican Governments.

The appellant argues that admitting what we say above, still the bar had not obtained, as the plaintiff claimed land covered by a Mexican Grant, and the suit was commenced within five years from the date of the Limitation Act of 1863, and her right was saved by the sixth *supplementary* section.

The misfortune of the plaintiff is that she failed to *connect* herself with any Spanish or Mexican title. The admission was

simply that the lands lay within the general description embraced in the decree.

The plaintiff must *deraign* title from, *connect* herself with, the Mexican source, to get the benefit of the proviso. The mere fact that the land in dispute falls within the limits of a Mexican rancho or the Pueblo does not fill the conditions of the exception.

It has been so uniformly held and assumed by this Court. When the plaintiff relies upon the proviso he must prove the facts upon which the proviso is called into action.

The defendant's adverse possession is sufficient to destroy the plaintiff's *prima facie* case arising from prior possession, and the plaintiff must then prove that the land is a Mexican grant, and deraign title from the grantee.

Vassault vs. Seitz, 31 Cal. 230.
Richardson vs. Williamson, 24 Cal. 289.

The plaintiff must have "held *under* a Mexican grant," say the Supreme Court.

Anderson vs. Fiske, 36 Cal. 632.
Arrington vs. Liscom, 34 Cal. R., p 389, 90,

It was only necessary for defendants to have adverse possession as against the plaintiff.

The main question is, was plaintiff barred by the Statute of Limitations?

It was admitted that defendants had had the actual, exclusive and adverse possession of the demanded premises, as against all the world (except as against the City and County of San Francisco), for five years, etc., before the filing of the complaint.

We submit, that to bar plaintiff's cause of action it was only necessary to have had an *adverse possession as against plaintiff*, because plaintiff is not connected with any right of the city and county, and does not deraign the right to recover from the city and county; and though it might be conceded that the city and county might have recovered against defendants, it does not follow that plaintiff can.

For illustration, the State granted a ninety-nine years' term

in certain water lots in San Francisco, and subsequently the fee or reversion.

A owned the term in 1860, and B the fee; B leased that year to C, for ten years, and C took and held possession for six years, under his lease from B, but adversely to A.

It is evident that while A would be barred by C's adverse possession, yet he would not have had any possession to the exclusion of his landlord, B.

So a tenant by courtesy—tenant for life or years—might be *barred* by an adverse possession against him, while the holder of the reversion would not be.

Sugden's Law of Vendors, 239, 240.
1 Burrows, 60, 2 Salkeld, 422.
Jackson vs. Schoonmaker, 4 John, 398.
Jackson vs. Selleck, 8 Johnson, 268, 269.
Lesse of Hall vs. Vandergrift, 3 Binney, 374–384, bottom 385.
Jackson vs. Johnson, 5 Cowen, 102, 103.
Wells vs. Prince, 9 Mass., 507, 508.
Wallingford vs. Hearl, 15 Mass., 471.

It is not the right of entry of the city and county that plaintiff relies upon and seeks to enforce, but her own right, founded *solely* upon an alleged *naked prior possession*, wholly *independent* of and ignoring the right of the city and county. And plaintiff cannot be permitted to recover on the weakness of defendant's right, as against the city and county.

Tilson vs. Thompson, 10 Pickering, 359.
Miller vs. Ewing, 6 Cushing, 34.

Hence it is not necessary that the possession should have been adverse to *all the world*, but only adverse to him who was ousted. Thus, if A was in as a trespasser and was ousted by B, who held for the statutory period adversely to A, as to him the statute would be a bar; while the owner, who had the right of entry against both A and B (and who was under a legal disability), would not be barred. That this is so is well illustrated by the familiar case of tenants in common.

Several heirs take lands by descent; a part when the descent was cast were of the age of majority, and a part lacked fifteen years of such age; all are ousted; the adults would become

barred by an adverse possession, while the infants might still recover their portion.

Thomas vs. Machin, 4 Bibb, 412.
Sanford vs. Button, 4 Day's R. 310.
Doolittle vs. Blakesly, 4 Day, 265.
Bryan vs. Hinman, 5 Day, 211.
5 Little, 34, 35.
1 Marsh, Ky., 39, 40.
1 Little Select Cases, 296, 7 Cranch, 156.
Rowe ex. dem. Langdon vs. Rawlston, 2 Taunton, 446; opinion by Mansfield.

It follows from these authorities that an adverse possession as against the plaintiff would defeat the plaintiff from recovering, although it might not be *adverse as against all the world.*

In further illustration of our view, the United States, as owner of the public domain, can never become barred by the Statute of Limitations; and *tacitly* the United States has invited miners to take and hold possession of mineral lands, water powers, water ditches, etc. Can there be a doubt that the first possessor would be barred by five years adverse possession as between him and he who committed the *ouster*, although the latter at all times admitted the superior title of the United States, and did not claim adversely to it. The contrary doctrine to be *now* advanced would be startling to the miners and ditch owners in California, and would be contrary to Davis vs. Gale, 32 Cal. 26, which held:

"If one who has the prior right to the use of water (by appropri-
"ation only), permits another to acquire and hold for five years,
"continuous adverse possession of the same, the first appropria-
"tor loses his right to the same, because of the adverse posses-
"sion against the first appropriator, but not against the United
"States, or 'against all the world,' nor 'against the true title.'"
(See The Union Water Company vs. Crary, 25 Cal. 509.)

In which case the Court, speaking through Justice Rhodes, said: "The right to the use of a water course in the public
"mineral lands, and the right to divert and use the water taken
"therefrom, is acquired by appropriation and user, the person
"first appropriating it being deemed to have *the title as against all*
"*the world, except the United States*, and persons claiming under
"them, to the extent that he thus appropriated it before the

"rights of others attached. *The rights thus acquired* may be "held, granted, *abandoned* or *lost* by the same means, as a right "of the same character issuing out of lands to which a *private* "*title exists.* The right of the first appropriator may be *lost*, in "whole or in some limited portions, by the *adverse possession* "*of another*," etc., etc. (Page 509.)

The plaintiff's right in the case at bar is founded wholly upon the *first* appropriation and *occupation;* the defendants' by an admitted *adverse* possession against that.

That those cases (last cited) are law in this State, no reasoning or argument can disprove. Being law, the defendants are entitled to an affirmance of the judgment, because the principle is thereby settled that the adverse possession need not be against the whole world nor against the true title, to become a bar as against a prior intruder or occupant.

In Huey vs. Smith, 3 Barr, Pa. 356, 503, both plaintiff and defendant were intruders upon the real owner, and it was held that as *between them* the *first* intruder became barred by the Statute of Limitations.

See Huey vs. Forman, 1 Pa. State R. 298.
Bishop vs. Lee, 3 Barr, 217.
Miller vs. Shaw, 7 Serg. & Rawles 138.
Wicklow vs. Lanes, 37 Barb. S. C. 250.
Thomas vs. Hatch, 3 Sumner 182.
Griswold vs. Butler, 3 Conn. 246, 5 Day 181.

The moment that it is conceded that proof of prior posession is *prima facie* evidence of a grant from the true owner, so as to entitle the prior occupant to recover in ejectment the principle is established that an ouster of, and an adverse holding against such prior possession sets the Statute of Limitations in motion; else we run into the absurdity of saying that a trespasser upon land is not affected by the Statute of Limitations, but the true owner is. The statute recognizes the difference between *seisin* (ownership) and prior *possession.* (See Sections 6 and 7 of the Statute.)

The statute reads:

"Sec. 6. No action for the recovery of real property, or for "the recovery of the *possession* thereof, shall be maintained *un*-"*less* it appear that the plaintiff, his ancestor, * * * was

"seized or *possessed* of the premises in question within five years "before the commencement of such action."

Clearly saying an adverse possession as against the true title is one thing, and against the intruder upon the "*true title*" is another.

This is illustrated by the following (not unfrequent state of facts): A claims lands under a Mexican grant; B ousts him, and remains in possession five years. C ousts B, and remains in possession five years. The eleventh year, A obtains United States patent. Can there be any doubt that as between B and C, B is barred by the statute, while A has five years from the date of his patent before he becomes barred as against the actual occupant, C, or his predecessor, B.

IV.

The plaintiff is not entitled to the benefit of the act of Congress of 8th March, 1866.

The following is a copy of that act:

An Act to Quiet the Title to certain Lands within the corporate limits of the City of San Francisco.

Be it enacted by the Senate and House of Representatives of The United States of America in Congress assembled:

That all the right and title of the United States to the land situated within the corporate limits of the City of San Francisco, in the State of California, confirmed to the City of San Francisco by the decree of the Circuit Court of the United States for the Northern District of California, entered on the eighteenth day of May, one thousand eight hundred and sixty-five, be, and the same are hereby relinquished, and granted to the City of San Francisco and its successors, and the claim of said city to said land is hereby confirmed, subject, however to the reservations and exceptions designated in said decree, and upon the following trusts, namely: that all the said land not heretofore granted to said city, *shall be disposed of and conveyed by said city to parties in the bona fide actual possession thereof, by themselves or tenants, on the pas-*

sage of this Act, in such quantities and upon such terms and conditions as the Legislature of the State of California may prescribe, except such parcels thereof as may be reserved and set apart by ordinance of said city for public uses; provided, however, that the relinquishment and grant by this act shall not interfere with or prejudice any valid adverse right or claim, if such exist, to said land, or any part thereof, whether derived from Spain, Mexico or the United States, or preclude a judicial examination and adjustment thereof.

Approved March 8th, 1866.

That act purports to relinquish and grant the lands "to parties in the *bona fide* actual possession * * * on the passage of this act."

Who is entitled to the benefit of this Act—the plaintiff or the defendants? Not the plaintiff, who was not in actual possession. The Legislature (by ratifying Order 800) have added other words (Stats. 1867-68, p. 381, sec. 11.) "*Or having been ousted from such possession before or since said day* (8th March, 1866), *have recovered or may recover the same by legal process.*"

If by these words the Legislature attempted to change or enlarge or diminish the class of beneficiaries, we think its attempt was nugatory.

Fischer vs. Benecia, 36 Cal. Rep., p. 562.

We think the author of the act of Congress intended by their omission more definitely and certainly to fix the class of beneficiaries: to do what the title of the Act purports—"quiet land titles," not disturb them.

But how is the plaintiff to have the benefit of this Act?

1. The plaintiff was never in possession. The plaintiff's intestate died Jan. 15, 1861, and consequently was not in possession on March 8th, 1861, and consequently was not in possession on March 8th, 1866, nor for five years before.

The plaintiff or her intestate were not in the "*actual* possession on March 8th, 1866. How could she or her predecessor, then, be in the *bona fide actual* possession? It is not possession merely—the requisite is *actual* possession on that day, and *bona*

fide. The term, "*actual* possession," in this State has a well-defined meaning.

2. But suppose the Legislature had the right to add the words above quoted, and to execute the trust in the manner and upon the terms prescribed in the act of 1868. Then the "ousting" spoken of cannot be permitted to give greater latitude to the words "*bona fide*" than this: that if A, in actual possession, is "ousted" by such *force* or *fraud* as would enable him to recover in an action of unlawful or forcible entry and detainer at the time the action is brought, or on the date of the act of Congress, March 8th, 1866, or of the act of the Legislature, March 27th, 1868, then he comes within the class of *bona fide* possessors. This is a fair and liberal interpretation. Any more latitudinarian construction will open the flood-gates of litigation in San Francisco.

Now it cannot be pretended that the evidence in this case would entitle the plaintiff to recover under the forcible entry and detainer act.

Owen vs. Doty, 27 Cal., p. 505.

1. Again, to go further, suppose the words of the Legislature are to have no more extended meaning, how can they cover the plaintiff's case? The words are: "having been ousted from such possession, before or since said day, have recovered or may recover the same by legal process."

How recover? Clearly, *independent* of the act; without the aid of it. The Legislature, in executing this trust, have said to parties ousted from possession, if you by legal process can recover the same—if you can show us that at the time of your *bringing suit*, your right to recovery was good, you shall have the benefit of this act of Congress.

This suit was brought August 17, 1867, and at that time more than five years adverse possession had run in defendant's favor. The plaintiff could not then recover.

Under a similar act of Congress, of July 1st, 1864 (U. S. Statutes at Large, Vol. 13, p. 332) relative to other lands in the city of San Francisco covered by the Van Ness ordinance (so-called), the Supreme Court of California decided that persons who, before the passage of the ordinance, had been in possession of land embraced within the area covered by it, and who had

been ousted by intruders, and who had no other right or title than such as proceeded from prior possession, must have commenced their actions within the time prescribed by the statute of limitations; and the statute commenced to run, as to such persons, on the 11th April, 1855, the date of the passage of the statute of limitations.

Pickett vs. Hastings, 47 Cal. R., p. 289.
McManus vs. O'Sullivan, 48 Cal. R., p. 19.

3. Again, how is the plaintiff to have the benefit of the act? The Legislature have the power to prescribe the "terms and conditions" upon the performance of which parties can claim to be cestuisque trust thereunder. The plaintiff has paid no taxes or assessments under section 11 of the ordinance, nor does it appear that they have been paid, nor has she shown performance of any of the terms or the conditions prescribed. How, then, can she claim the benefit of the act of Congress, or the Legislature, or the Ordinance?

This subject was fully considered by the Supreme Court of California in Dupond vs. Barstow, and that Court decided that:

As Congress relinquished and granted to the city of San Francisco the right of the United States to certain lands within its limits, to hold in trust, to dispose of and convey the same to parties in possession thereof, on such conditions as should be prescribed by the Legislature. And one of the conditions prescribed by the Legislature, by which a person in possession, or who had been unlawfully ousted, was to become entitled to the benefit of the act of Congress, was that, prior to a certain time, all taxes which had been assessed during five years preceding, shall have been paid; no title vested in one in possession, or who had been ousted from possession, unless he, or some one acting in his behalf, had paid such taxes; also the same rule prevailed as to the payment of an assessment imposed on the land as a condition precedent to vesting title.

Dupond vs. Barstow, 45 Cal. R., p. 451.

4. Again, this Act of the Legislature conferring certain rights upon parties, upon performance of specified terms and conditions, was passed March 27th, 1868. How can the plaintiff in *this suit*, which was commenced August 17, 1867, claim any rights under an act passed subsequent thereto, in March 1868.

Defendants had been in possession five years previous to the passage of the Act of Congress on March 8th, 1866, as it will appear when it is remembered: That plaintiff's intestate died January 15th, 1861; that plaintiff claims that McManus was in possession until his death: that Cook testifies that the McManus house disappeared in January 1861; and in April or May, 1861, the next time the premises are mentioned, John P. Buckley, the ancestor of the defendants Buckleys, and the tenant-in-common with defendants Sullivan and Cashman, was in possession.

The conclusion is natural and inevitable, that the defendants were in possession as early as January, 1861, more than five years previous to 8th March, 1866, and that such possession was adverse to plaintiff's intestate.

Defendants are the "cestui que trust."

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1. Defendants were in the possession on March 8th, 1866. They were in the *actual* possession, and had been continuously since January, 1861. They were confessedly in the adverse possession to everybody except the City, from January 1st, 1862. As argued above, these facts show them to be the beneficiaries under the Act.

2. Does it show them to be the *bona fide* actual possessors? Yes. For first, the admission of five years adverse possession in us necessarily *ex vi termini* admits our *bona fides.* It is implied in the very idea of adverse possession. And the consideration urged that if such be the force of the admission, the plaintiff should be relieved against it, as it was imprudently entered into, has no foundation. It was her own voluntary proposition. We could have proved far more than the admission. It is a solemn admission made in open Court, and is binding and controlling. The admission is "that defendants would introduce *such* "*proofs, and also would,* etc." And it was argued that the defendants held in good faith, on the motion for non-suit—not after the admission was made, for then there was not, and was no need of, any argument on anything. The trial was ended.

But further. The terms "*bona fide,*" in the connection used in the Act, have reference to the possessor's intent to obtain the paramount title. The question is: was he in the actual possession on March 8th, 1866, and in good faith settled on the

land, intending to get the paramount or city's title? Or was he there without any *bona fide* intent to claim the land? This is to be arrived at from the circumstances of each case.

In this case all the evidence shows that the defendants were there holding and claiming this land as theirs.

In the Act of Congress of July 1st, 1870, entitled an Act to relinquish the interest of the U. S. in certain lands in the City and County of San Francisco, the expression "actual, *bona fide* possession" is also used, which has been defined by the Supreme Court of California to refer to only an actual possession, which was *bona fide* as between adverse claimants, and not as against the Government.

Le Roy v. Cunningham, 44 Cal. R., p. 608.

Also for construction of another similar Statute, see

Alemany v. The City of Petaluma, 38 Cal. R., p. 553.
Jones v. The City of Petaluma, 38 Cal. R., 397.

Defendants' answer sets up their compliance with the terms and conditions prescribed, as far as it was possible then to comply, and their willingness and determination, to continue to comply to the end of the chapter.

We submit that no greater fallacy can exist than the construction which the plaintiff's counsel endeavors to force upon the word "*bona fide*," as meant by the Act of Congress, of March 8th, 1866.

If his construction can be attached, then the Statute of Limitations is designed to work a fraud, instead of quieting the titles; for under such a construction, no possession can give title, unless it be taken in subordination to the older claim, which would, of course, defeat itself, because it is not adverse. We think that if a party is in possession holding adverse, such holding is necessarily *bona fide*, because he intends to acquire title for himself. Not to be *bona fide*, means with deceit or fraudulent practice—such as, under the owner, or with his consent, and to hold for him, and then claiming the benefit of the possession without surrender. In this case, defendant's holding was, from the first *at arms length*. Otherwise, no person can hold adverse, unless he admits the truth of every claim of title which his opponent makes—which would be simply absurd to require.

V.

The McManus estate was not in possession of the premises by its tenants or otherwise, on the 8th March, 1866.

The counsel for plaintiff labor hard to prove in ckl r second point, that the McManus estate was in *possession o* n-co *premis by its tenants*, on 8th March, 1866, and argue tha ts were in fact or in law the tenants of plaintiff and her in estate; counsel say the defendants were intruders upon the pos ion of plaintiff, or that of her intestate, and therefore tenants of plaintiff.

A tenant is one who holds the actual possession in subordination to another party or by virtue of an agreement either express or implied.

A tenant is one who holds of another.

2 Burrill's Dict. "Tenant."

A tenant cannot be holding adversely to the party whose tenant he is; his adverse holding destroys his character as tenant. The defendants cannot be holding for or under the plaintiff, and yet hold adversely to the plaintiff. The admission of plaintiff's counsel on the trial was: "That the defendants were "in the actual, open, exclusive and notorious possession of the "land in controversy for more than five years prior to the com- "mencement of this suit, and on and ever since the first day of "January, A. D. 1862, and had held the same from that date "adversely to the plaintiff, her ancestors, predecessors and grant- "ors, and to the estate of T. B. McManus, deceased." This admission refutes all idea of tenancy.

Even a conventional tenant may cease to be a tenant and become an intruder, and with aid of the Statute of Limitations, successfully resist the landlord, if the latter shall after notice, permit such tenant to continue an occupation adverse, open and notorious, under a claim of right sufficiently long.

Thompson v. Pioche, 44 Cal., 518.

The actual, open, exclusive and notorious possession of the defendants, destroys every obligation of a tenancy, if acquiesced in by the landlord.

A similar expression has been the subject of judicial investigation in this State.

By the Act of Congress July, 1st, 1864, (U. S. Statutes at Large, Vol. 13, p. 332,) section 5, the title of the United States to other lands within the limits of the City of San Francisco, and of the Van Ness Ordinance, so called, was ceded to the city for the uses and purposes specified in the ordinances ratified by the State Legislature. The ordinance granted the land "to the "parties in the actual *possession thereof, by themselves or tenants* "on or before the first day of January, 1855, and to their heirs "and assigns forever."

The State Supreme Court decided that the word tenant thus used, meant a conventional tenant, and any party who holds the actual possession in subordination to another party under or by virtue of an agreement either express or implied.

Brooks v. Hyde, 37 Cal. R., p. 374.
Irvine v. Adler, 44 Cal. R., 559.

We cannot conceive a reason why the identical words, "possession thereof, by themselves or tenants," when found in the Act of Congress of 8th March, 1866, should receive a different signification or interpretation. Therefore in no sense can it be held that the defendants were or are the tenants of the plaintiff or her intestate, and thus extend the plaintiff's actual possession beyond January 15th, 1861, the death of McManus, or the 1st day of January, 1862, the admitted date of the beginning of defendants' adverse possession.

We respectfully submit that the judgment of the Supreme Court of the State of California should be affirmed.

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SHARP & LLOYD, AND WILLIAM H. PATTERSON,
San Francisco, Cal.,
Attorneys for Defendant Peter Donahue.

EXHIBIT A.

United States Land Commission for California.

Decree of confirmation, filed December 21st, 1854.

THE CITY OF SAN FRANCISCO
vs.
THE UNITED STATES. } No. 280.

In this case, on hearing the proofs and allegations, it is adjudged by the Commission, that the claim of the petitioner is valid, and it is therefore decreed that the same be confirmed.

The land of which confirmation is made, is that known by the name of the Pueblo lands of San Francisco, and is bounded as follows: Beginning at the little cove to the east of the Fort, and running across the beach so as to leave the Fort and casamata to the north; thence running along the beach to Point Lobos on its southern part; thence a straight line to the summit of the Devisdero, continuing said line to the east as far as the Punta del Rincon, including the canutales and El Gentil, the said line will terminate within the Bay of the Mission of Dolores—the estuary of which will form a natural boundary between the municipal jurisdiction of that Pueblo and the said Mission of Dolores; thence along the shore of the Bay of San Francisco as it existed in the year 1834, to the point of beginning. For a more particular description, reference to be had to the copy of the order from Governor Jose Figuerro to General Mariana G. Vallejo, dated Monterey, November 4th, 1834, marked Exhibit No. 18, to the disposition of M. J. Vallejo, taken in No. 280, H. I. T., and now on file among the papers in the case.

ALPHEUS FELCH,
R. AUG. THOMPSON,
S. B. FARWELL.

EXHIBIT B.

Final decree confirming the claim of the City of San Francisco to its Pueblo lands, entered May 18, 1865.

THE CITY OF SAN FRANCISCO
vs.
THE UNITED STATES. }

The appeal in this case taken by the petitioner, the City of

San Francisco, from the decree of the Board of Land Commissioners, to ascertain and settle the private land claims in the State of California, entered on the twenty-first day of December, 1854, by which the claim of the petitioner was adjudged to be valid and confirmed to lands within certain described limits, coming on to be heard upon the transcript of proceedings and decision of said Board, and the papers and evidence upon which said decision was founded, and further evidence taken in the District Court of the United States for the Northern District of California pending said appeal—the said case having been transferred to this Court by order of the said District Court, under the provisions of section four of the Act entitled "An Act to expedite the settlement of titles to lands in the State of California," approved July 1st, 1864—counsel of the United States and for the petitioner having been heard and due deliberation had, it is ordered, adjudged and decreed, that the claim of the petitioner, the City of San Francisco, to the land hereinafter described, is valid, and that the same be confirmed.

The land of which confirmation is made, is a tract situated within the County of San Francisco, and embracing so much of the extreme upper portion of the peninsular above ordinary high water mark (as the same existed at the date of the conquest of the country, namely: the seventh day of July, A. D. 1846); on which the City of San Francisco is situated, as will contain an area of four square leagues—said tract being bounded on the north and east by the Bay of San Francisco, on the west by the Pacific Ocean, and on the south by a due east and west line, drawn so as to include the area aforesaid, subject to the following deductions, namely: such parcels of land as have been heretofore reserved or dedicated to public uses by the United States; and also such parcels of land as have been by grants from lawful authority vested in private proprietorship, and have been confirmed to parties claiming under said grants by the tribunals of the United States, or shall hereafter be finally confirmed to parties claiming thereunder by said tribunals in proceedings now pending therein for that purpose; all of which said excepted parcels of land are included within the area of four square leagues above mentioned, but are excluded from the confirmation to the city. *This confirmation is in trust for the benefit* of the lot holders under grants from the Pueblo, Town, or City of San Francisco, or other competent authority, and as to any

residue, *in trust for the use and benefit of the inhabitants of the city.*

San Francisco, May 18th, 1865.

FIELD, Circuit Judge.

EXHIBIT C.

An Act to Quiet the Title to certain Lands within the corporate limits of the City of San Francisco.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:

That all the right and title of the United States to the land situated within the corporate limits of the city of San Francisco, in the State of California, confirmed to the city of San Francisco by the decree of the Circuit Court of the United States for the Northern District of California, entered on the 18th day of May, one thousand eight hundred and sixty-five, be and the same are hereby relinquished and granted to the city of San Francisco and its successors, and the claim of said city to said land is hereby confirmed, subject, however, to the reservations and exceptions designated in said decree, and upon the following trusts, namely: that all the said land not heretofore granted to said city, *shall be disposed of and conveyed by said city to parties in the bona fide actual possession thereof, by themselves or tenants, on the passage of this act, in such quantities and upon such terms and conditions as the Legislature of the State of California may prescribe,* except such parcels thereof as may be reserved and set apart by ordinance of said city for public uses, provided, however, that the relinquishment and grant by this act shall not interfere with or prejudice any valid adverse right claim, if such exist, to said land, or any part thereof, whether derived from Spain, Mexico or the United States, or preclude a judicial examination and adjustment thereof.

Approved March 8th, 1866.

EXHIBIT D.

(Statutes 1867–68, p. 381.)

Abstract of an Act to confirm a certain Order passed by the Board of Supervisors of the City and County of San Francisco. Approved March 27th, 1868.

SECTION 1. Whereas, the Board of Supervisors of the City

and County of San Francisco, passed an order number eight hundred, which said order was approved by the Mayor and President of the Board of Supervisors on January 14th, eighteen hundred and sixty-eight, and which is as follows:

Order No. 800. An order for the settlement and quieting titles to land in the City and County of San Francisco situate above high water mark of the Bay of San Francisco and the Pacific Ocean, and without the corporate limits of the City of San Francisco.

The People of the City and County of San Francisco do Ordain as follows:

N. B. Here follows a copy of the order, of which Section eleven of said order No. 800, is in words and figures following, to wit:

SEC. 11. Upon the payment to the County Treasurer of the City and County of San Francisco, of the amount assessed by the Committee provided for in Sec. 10 of this order, the City and County of San Francisco hereby relinquishes and grants all the right and title and claim which the said City and County now has or may hereafter acquire as successor of the Pueblo of San Francisco, or as grantee, or the patentee of the United States, in and to the lands hereinbefore in this order described, and not excepted or reserved, or intended to be excepted or reserved, by any of the preceding sections and provisions, and upon which shall be paid, previous to the first day of April, A. D. 1868, all taxes which have been assessed thereon during the five fiscal years preceding the year beginning July 1st, A, D. 1866, unto the persons, or to the heirs and assigns of persons who were on the 8th day of March, A. D. 1866, in the actual *bona fide* possession thereof, by themselves or their tenants, *or having been ousted from such possession, before or since said day, have recovered, or may recover the same by legal process.* And it is hereby declared to be the intent and object of this section to pass the right, title and claim of the said City and County, in and to every tract or portion of said land delineated on said map, except the portions that are or may be reserved as aforesaid, possessed by one person, unto the possessor thereof in severalty; and every separate tract or portion thereof, except the portions that are or may be reserved as aforesaid, possessed by more than one person, jointly or in common, unto the possessors thereof, jointly or in common.

Service accepted by Copy this _____

day of October, A. D. 1875.